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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-22

STERLING OIL OF OKLAHOMA, INC., W. H. JAMES, JR. as individual trustee for Sterling Oil of Oklahoma, Inc. as successor to Albert Barnes Zink as individual trustee for Sterling Oil of Oklahoma, Inc., and HERBERT C. SMYTH as individual trustee for Sterling Oil of Oklahoma, Inc.,
Petitioners,

versus

BART B. CHAMBERLAIN, JR., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

STERLING OIL OF OKLAHOMA, INC., W. H. JAMES, JR. as individual trustee for Sterling Oil of Oklahoma, Inc. as successor to Albert Barnes Zink as individual trustee for Sterling Oil of Oklahoma, Inc., and HERBERT C. SMYTH as individual trustee for Sterling Oil of Oklahoma, Inc.,

Petitioners,

versus

BART B. CHAMBERLAIN. JR., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Sterling Oil of Oklahoma, Inc. (Sterling Oil), W. H. James, Jr. as individual trustee for Sterling Oil as successor to Albert Barnes Zink as individual trustee for Sterling Oil (James), and Herbert C. Smyth as individual trustee for Sterling Oil (Smyth), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Fifth Circuit entered in the above entitled case on the 9th day of February, 1973 in favor of respondents, Bart B. Chamberlain, Jr. (Chamberlain), G. H. Jett (Jett), The Equity Corporation, Cornwall Trading Corporation, Howard M. Pack (Pack), Joseph Kahn (Kahn), Geo. H. Jett Drilling Co. Inc. (Jett Drilling), James E. Kemp, Kemp Oil Co. Inc., Four States Drilling Co. Inc., and Big Four Oil Co. Inc., herein collectively called the Chamberlain group.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the district court (R. 299-302.) denying the petition of Sterling Oil for a temporary injunction is unreported and is printed in Appendix B hereto, *infra*, p. 27a. Excerpts from the oral statements of the district judge (R. 349-361.) made in connection with the granting of the motion of the Chamberlain group to stay the federal proceedings are printed in Appendix B hereto, *infra*, p. 30a. The order of the district court (R. 361-2.) granting the motion to stay is set forth in Appendix B hereto, *infra*, p. 43a. The reasons advanced by the district judge (R. 403-4.) for granting the stay of the federal proceedings were stated by the district judge in another action involving Chamberlain and are printed in Appendix B hereto, *infra*, p. 44a. The opinion of the district court (R. 395-7.) granting the Chamberlain group's motion for summary judgment is unreported and is printed in Appendix B hereto, *infra*, p. 45a. The opinion of the circuit court of appeals is reported in 474 F.2d 149 and is printed in Appendix B hereto,

infra, p. 4a. The opinion of the circuit court of appeals in the first appeal of this cause is reported in 362 F.2d 723 and printed in Appendix B hereto, *infra*, p. 48a; a writ of certiorari was denied on the first appeal in 385 U.S. 987.

JURISDICTION.

The opinion and judgments of the circuit court of appeals were entered on February 9, 1973, Appendix B hereto, *infra*, pp. 4a, 23a, 24a. Rehearing was denied on March 30, 1973, Appendix B hereto, *infra*, p. 22a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Does the federal anti-injunction statute, 28 U.S.C. 2283, deprive a district court of jurisdiction in a removed diversity action to enjoin proceedings in a subsequently filed nonremovable state action where (a) the removed plaintiff caused the subsequent state action to be filed by others against himself and the removed defendants, and (b) the removed action had progressed through partial summary judgment, discovery, issuance of pre-trial order, and trial setting, when the removed plaintiff caused the state action to be set for trial ahead of the previously announced trial date of the removed action?

2. May a district court after a jury has been struck abdicate its authority and stay a removed action in-

volving the validity of a contract evidencing a transaction involving commerce and providing for arbitration until the final determination of a subsequently filed nonremovable state action where the removed plaintiff caused the subsequent nonremovable action to be filed by others against himself and the removed defendants and caused the state action to be set for trial ahead of the previously announced trial date of the removed action?

3. Is a judgment obtained in a state court while a federal action is wrongfully stayed *res judicata* in the federal action where, except for the wrongful stay, the federal action would have been determined on the merits?

4. Is an order of a district court staying an action pending the determination of a subsequently filed state action reviewable as an integral part of an appeal from the entry of summary judgment based upon the *res judicata* effect of the final judgment in the subsequently filed state action?

5. Is a party estopped from contending that a federal court has exclusive *quasi in rem* jurisdiction because in a previous appeal the party argued that the action was *in personam?*

STATUTES INVOLVED.

The statutory provisions involved are Sections 1291, 1332(a) and 2283 of the United States Judicial Code, 28 U.S.C. Sections 1291, 1332(a) and 2283, Sections 1 and 2 of the United States Arbitration Act of 1925, as amended, 61 Stat. 670, 9 U.S.C. Sections 1 and 2, and the Civil Rights Act of 1971, R.S. § 1979, 42 U.S.C. 1983. The

statutory provisions involved are printed in Appendix A, *infra*, pp. 1a-4a.

STATEMENT.

On March 26, 1963 Jett and Chamberlain brought suit against Sterling Oil in the Circuit Court of Mobile County, Alabama (Jett-Chamberlain action) seeking a declaratory judgment as to the validity of an agreement made as of May 1, 1959 between Jett, Chamberlain and Sterling (Sterling Agreement) which attempted to define the interest of Jett, Chamberlain and Sterling in an oil field and gathering system purchased by Jett and Chamberlain; the Sterling Agreement provided for arbitration to determine the interest of Sterling Oil in the oil field. (Appendix B, *infra*, pp. 7a, 20a n.12.) Sterling Oil properly removed the Jett-Chamberlain action to the district court pursuant to 28 U.S.C. 1441 because of complete diversity and an adequate amount in controversy and counterclaimed for an accounting and other relief. (Appendix B, *infra*, pp. 8a, 10a; R. 91-95.) Chamberlain unsuccessfully caused Pack, Kahn and Jett Drilling to attempt to intervene in the Jett-Chamberlain action and thereby destroy diversity jurisdiction. (Appendix B, *infra*, pp. 8a, 10a n.4, 13a, 14a n.10, 15a.) While the motions to intervene were pending, Chamberlain caused Pack, Kahn and Jett Drilling to file an action in the Circuit Court of Mobile County, Alabama, "primarily against Jett, Chamberlain, and Sterling Oil (Pack-Kahn action)." (Appendix B, *infra*, pp. 8a, 10a n.4, 13a, 14a n.10, 15a.) The relief requested in the Pack-Kahn action "was identical to that sought in the Jett-Chamberlain action." (Appendix B, *infra*, 8a.) Sterling unsuccessfully attempted to remove the

Pack-Kahn action on the grounds of fraud and a separate controversy.[1] (Appendix B, *infra*, p. 8a.)

In November 1963 Sterling filed an action against Jett and Chamberlain (Sterling Oil action) in the district court requesting the same relief as Sterling had requested in its counterclaim in the Pack-Kahn action (R. 636-639); in November 1966 the district court consolidated the Jett-Chamberlain action and the Sterling Oil action. (R. 131, 132.)

In November 1966 in the Jett-Chamberlain action the district court entered a partial summary judgment finding the Sterling Agreement to be a "valid, enforceable and subsisting agreement" and reserved for future determination the "meaning or enforcement *vel non* of any of the specific provisions of the Sterling Agreement." (Appendix B, *infra*, p. 18a.) In "February 1971, the district court . . . began pre-trial proceedings" and set the Jett-Chamberlain action for trial on July 12, 1971. (Appendix B, *infra*, pp. 9a, 37a, 44a; R. 303.) On March 4, 1971 the district court

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[1]The first appeal, *Jett v. Zink*, 362 F.2d 723 (5th Cir. 1966) cert. *denied*, 385 U.S. 987 (1966), was decided before Sterling Oil was allowed to commence discovery; the facts pertaining to Chamberlain's control over the litigation were developed after the decision in *Jett v. Zink*. (Appendix B, *infra*, pp. 8a-9a, 14a; R. 413, 417-20, 421-2, 426, 432-3, 439, 444.)

According to their own testimony neither Pack, Kahn, nor Jett knew about or participated in the decision to attempt to intervene in the Jett-Chamberlain action or to bring the Pack-Kahn action. (R. 412-20, 421-8, 432-4, 437-9, 444, 448-50.) Pack acknowledged that taking the case out of the jurisdiction of the federal court and putting it into the state court was a satisfactory reason for filing the Pack-Kahn action if it would accomplish its purpose. (R. 451-2.) A summary of the testimony of Pack, Kahn and Jett pertaining to their nonparticipation in the litigation appears in Appendix D, *infra*, pp. 67a-70a.)

held its pre-trial hearing and entering its pre-trial order. (R. 248-252.) On March 5, 1971 Chamberlain moved the state court to set the Pack-Kahn action for trial on May 3, 1971,[2] (Appendix C, *infra*, pp. 63a-66a; R. 270-1, 563-5.) On March 8, in an *ex parte* order the state court set the Pack-Kahn action for trial on May 3, 1971. (Appendix B, *infra*, p. 10a; R. 567.)

Sterling Oil sought an injunction against the state proceeding on the grounds that Sterling Oil had a right under the removal statutes to have its controversy with Chamberlain determined in a federal forum, to prevent harassment of a federal litigant through the state proceeding, and because the federal court had exclusive *quasi in rem* jurisdiction over the interest of Sterling Oil, Jett and Chamberlain in the oil field and gathering system that were the subject of the Sterling Agreement. (Appendix B, *infra*, pp. 10a, 15a-16a, 29a.) The district court denied injunctive relief, concluding that the Jett-Chamberlain action "is *in personam* and the court is without jurisdiction to issue the desired injunction." (R. 300.) The district court reasoned that (R. 300-301.)

> Sterling is requesting the court to interpret the Sterling agreement and order specific performance of the contract as interpreted. Money damages are requested for injuries already

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[2]The circuit court of appeals erroneously stated that the "Chamberlain group filed in the state court a motion to have the Pack-Kahn action set for trial before the Jett-Chamberlain action" (Appendix B, *infra*, p. 10a.); the motion was actually filed by Chamberlain only; the remainder of the Chamberlain group accepted service and waived "notice of the hearing of same." (Appendix C, *infra*, pp. 63a, 65a-66a; R. 563-6; Appendix B, *infra*, p. 44a.)

> sustained and in lieu of specific performance if performance is not possible. In this posture there is no necessity of this court having possession of the leases or properties. Sterling has agreed to take money damages as a substitute.

The circuit court of appeals held that Sterling Oil was estopped to claim that the Jett-Chamberlain action was *quasi in rem*[3] (Appendix B, *infra*, p. 17a.) and that "Chamberlain had been given authority to act for Pack, Kahn, and Jett, and he was justified in bringing suit in their names to protect their interests." (Appendix B, *infra*, p. 15a.)

On July 10, 1971 the state court held the Sterling Agreement to be "valid, . . . reserving for future determination . . . the meaning and enforceability *vel non* of the specific provisions of the Sterling Agreement." (R. 320-2; Appendix B, *infra*, p. 10a.)

On July 12, 1971, the day the trial of the Jett-Chamberlain action was to begin, "Chamberlain's group . . . filed a motion in the district court to stay the federal proceedings pending a final determination" of the Pack-Kahn action in the state court. (Appendix B, *infra*, pp. 10a-11a.) The federal court struck a jury and continued the cause until July 14, when

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[3]Neither Sterling Oil, the Chamberlain group nor the circuit court of appeals used the words "*in personam*", "*quasi in rem*" or "*in rem*" in briefs or opinion in the first appeal. Sterling Oil argued that Jett and Chamberlain had "personal obligations" to convey a portion of the oil properties owned by Jett and Chamberlain to Sterling; such an argument is consistent with the federal court's "*quasi in rem*" jurisdiction over the interests of Jett and Chamberlain in the properties. (Appendix B, *infra* pp. 16a, 58a, 61a.)

the district court, without opinion, granted the motion to stay and declared a mistrial.[4] (R. 348, 361-3; Appendix B, *infra*, pp. 10a-11a.) On July 16, 1971 the district court denied the motion of Sterling Oil for a permanent injunction against the prosecution of the Pack-Kahn action. (Appendix B, *infra*, p. 11a.)

In November 1971 the state court "set aside and cancelled" its decree holding the Sterling Agreement valid and held that the Sterling Agreement was "not valid and enforceable." (R. 386-390, Appendix B, p. 11a.) On January 27, 1972 "the district court granted the Chamberlain group's motion for summary judgment (in the Jett-Chamberlain action and the Sterling Oil action) based on the res judicata effect of the state court decree." (Appendix B, *infra*, p. 11a.)

Sterling Oil timely appealed from the order of the district court denying Sterling Oil's petition for a permanent injunction (R.364-5), and on November 1, 1971 Sterling Oil amended its notice of appeal to include the order granting the stay. (R. 397.) Sterling Oil timely appealed from the summary judgment. (R. 398-9.)

The court of appeals dismissed the appeal from the stay order as untimely (Appendix B, *infra*, p. 20a, n.12)

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[4]Although the district court did not enter an opinion, in another action in which Chamberlain was a party, the district court said:

> "After this court's announced trial date . . . Chamberlain secured an earlier trial setting in the state court and began the taking of testimony prior to the setting in this court. Therefore, when the cases were called for trial in this court, it was necessary to stay the action here pending the outcome in the state court." (R. 403-4; Appendix B, *infra*, p. 44a.)

and refused to review the stay as a part of the appeal from the final judgment.[5]

The court of appeals concluded that "even when viewed collectively," Sterling Oil's theories "fail to establish the impropriety of the state action necessary to overcome the restrictive contraction placed on section 2283" by *Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). (Appendix B, *infra*, p. 20a.)

REASONS FOR GRANTING THE WRIT.

1. The issues presented here are of importance in defining the scope of the right of a removing defendant to have his controversy determined in a federal forum and just what, if anything, the removed plaintiff may do to deprive the removing defendant of his "right granted by Congress to have the federal court decide the issues presented." *French v. Hay*, 22 Wall 250 (1873); see *Donovan v. Dallas*, 377 U.S. 408, 413 (1964).

Both the court of appeals and the trial court were of the opinion that the federal anti-injunction statute, 28 U.S.C. §2283, prohibited federal courts from enjoining subsequent state proceedings fomented and controlled by a plaintiff in a removed action. (Appendix B, *infra*, pp. 12a, 20a, 27a-28a.) The reliance of the court of appeals on the anti-injunction statute in declining to protect Sterling Oil's right to a federal forum in its dispute with Jett and Chamberlain appears to

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[5]Reviewability of the stay as an integral part of the appeal from the summary judgment was specifically raised in the petition for rehearing.

be in direct conflict with the long recognized principle that the anti-injunction statute does not apply to removed actions. *French v. Hay*, 22 Wall 250 (1873); *Mitchum v. Foster*, 407 U.S. 225, 234 (1972).

The court of appeals did recognize that it was faced with an important issue of the respective jurisdictions of state and federal courts. The court of appeals found that the "now apparent fact that Chamberlain controlled both pieces of litigation is cause for serious concern" (Appendix B, *infra*, p. 15a) and again recognized that the result of its decision in *Jett v. Zink*, 362 F.2d 723, 730 (5th Cir. 1966), *cert. denied*, 385 U.S. 987 (1966), (Appendix B, *infra*, p. 9a.)

> is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

The Court has not had the opportunity to determine whether the principle enunciated in *French v. Hay*, 22 Wall 250 (1873), applies to a case where, as here, the removed plaintiff causes persons who are not parties to the removed action to file a nonremovable action in a state court against all of the parties to the properly removed action.

The questions presented are of importance because the "prompt, economical and sound administration of justice depends to a large degree upon definite and

finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 8 (1951).

2. The court of appeals acknowledged that its first "decision signaled the start of a race to the courthouse." (Appendix A, *infra*, p. 9a.) If a removing defendant must win a race to the courthouse to effect his Congressionally granted right to a trial in a federal forum, this Court should, we submit, formulate the rules for the race.

3. The failure of the court of appeals to review the interlocutory order staying further proceedings in the federal action as an integral part of the appeal from the summary judgment is in direct conflict with the decision of the Second Circuit in *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441, 443 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968), where the court held that "in the interest of efficient judicial administration . . . we should review the interlocutory stay order on this appeal from a final order dismissing the action" and with the decision of the District of Columbia Circuit in *Taylor v. Washington Terminal Company*, 409 F.2d 145, 147 (D.C. Cir. 1967), *cert. denied*, 396 U.S. 835 (1969).

The failure of the court of appeals to review the stay of the federal proceedings justifies the exercise of this Court's power of supervision to correct the drastic departure from the accepted and usual procedure of reviewing all interlocutory orders on an appeal from a final judgment.

4. The district court intentionally abdicated federal jurisdiction when it granted the stay; the trial court stated (Appendix B, *infra*, p. 42a; R. 360):

> regardless of how that case (Pack-Kahn action) goes down there I expect to hold the case as Res Judicata and dismiss it from this docket.

The granting of the stay by the trial court is in direct conflict with *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943), which established that a district court may not deprive a diversity litigant of a federal forum by staying an action absent exceptional circumstances not present here.

Here, the trial court granted the stay because after the setting of the trial date of the federal action "Chamberlain secured an earlier trial setting in the state court and began the taking of testimony." (Appendix B, *infra*, p. 44a.) The reasoning behind the stay is in direct conflict with the principle enunciated in *Donovan v. Dallas*, 377 U.S. 408, 413 (1964), that once jurisdiction of the federal court and the right of the litigant to prosecute his suit in a federal forum is established, such "right cannot be arrested or taken away by another court."

5. Chamberlain has effectively deprived Sterling Oil of its Congressionally created right to have its dispute with Jett and Chamberlain determined in a federal forum. Apart from the removed action exception to 28 U.S.C. §2283, the Civil Rights of 1871, 42

U.S.C. §1983, as construed in *Mitchum v. Foster*, 407 U.S. 225, 237 (1972), appears to entitle a federal litigant protection from subsequently filed state actions designed to frustrate the federal litigant's right to trial in a federal court.

We submit that Chamberlain acted in "bad faith," to deprive Sterling Oil of a federal forum. *Younger v. Harris*, 401 U.S. 37, 49 (1971). Chamberlain also created "needless friction" between the state and federal courts. (Appendix B, *infra*, pp. 31a, 39a-40a.) See *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8-9 (1940).

This cause, we submit, presents the Court an opportunity to decide "exactly how great a restraint is imposed . . . ["by the principles of equity, comity, and federalism"] on a federal court asked to enjoin state *civil* proceedings." *Mitchum v. Foster*, 407 U.S. 225, 244 (1972) (concurring opinion).

6. The holding of the court of appeals that Sterling Oil is estopped from contending that the district court had exclusive *quasi in rem* jurisdiction over the interest of Jett, Chamberlain and Sterling Oil in an undivided interest in the oil field because Sterling Oil argued that the Jett-Chamberlain action was *in personam* on the first appeal, disregards the principle that a party can neither confer jurisdiction on a court where none exists nor deprive the court of jurisdiction that does exist and is in conflict with the decision in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated at Mobile, Alabama, this 26th day of June, 1973.

Respectfully submitted,

WILLIS C. DARBY, JR.,
Counsel for Petitioners,
Post Office Box 2565
Mobile, Alabama 36601

PROOF OF SERVICE.

I, Willis C. Darby, Jr., the attorney for Sterling Oil of Oklahoma, Inc., James and Smyth, the Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of June, 1973, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid to their respective attorneys of record as follows:

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To Joseph M. Matranga, Esquire, Attorney for G. H. Jett and Geo. H. Jett Drilling Co. Inc.,
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APPENDIX A

STATUTES INVOLVED

UNITED STATES ARBITRATION ACT OF 1925
9 U.S.C. Section 1-2

Section 1. "Maritime transactions; and "commerce" defined; exceptions to operation of title

"Maritime transactions":, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, 61 Stat. 670.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving com-

merce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, c. 392, 61 Stat. 670.

UNITED STATES JUDICIAL CODE
28 U.S.C. 1291

FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for thte District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48,65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

UNITED STATES JUDICIAL CODE
28 U.S.C. 1332(a)

DIVERSITY OF CITIZENSHIP

The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

UNITED STATES JUDICIAL CODE
28 U.S.C. 1441(a)

ACTIONS REMOVABLE GENERALLY

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

UNITED STATES JUDICIAL CODE
28 U.S.C. 2283

FEDERAL ANTI-INJUNCTION STATUTE

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

CIVIL RIGHTS ACT OF 1871

TITLE 42 SECTION 1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

APPENDIX B

Opinions and Orders Below

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2745

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Appellees,
versus

ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Defendant,

STERLING OIL OF OKLAHOMA, INC., ET AL.,
Defendants-Appellants.

No. 72-1637

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Third Party
Plaintiffs-Appellees,

versus

ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Defendant,

W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Defendants-Appellants,

CORNWALL TRADING CORPORATION, ET AL,
Third Party
Defendants-Appellees.

ALBERT BARNES ZINK, as Individual Trustee for STERLING OIL OF OKLAHOMA, INC.,
Plaintiff,

W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Plaintiffs-Appellants,
versus

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Defendants-Third Party
Plaintiffs-Appellees,

CORNWALL TRADING CORPORATION, ET AL,
Third Party
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Alabama

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(February 9, 1973)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

DYER, Circuit Judge: These appeals are before us for the third and hopefully final time in the protracted litigation over the purchase of certain oil leases and a gathering system in or near Mobile County, Alabama. As in each of the two previous appeals, the questions presented do not concern the merits of the dis-

pute, but instead ask us to decide the forum — state or federal — in which the "main" battle should properly be joined. We find that the district court's refusal to enjoin the pending state court proceeding and its recognition of the res judicata effect of that court's final judgment were not erroneous. Therefore we affirm the judgment of the district court in both appeals.

When this case was first before this court we described the state of the litigation as it existed in early 1964 as "convoluted." *Jett v. Zink*, 5 Cir. 1966, 362 F.2d 723, *cert. denied*, 385 U.S. 987. The ensuing eight years have clarified little except Chamberlain's unabated desire to have the case heard in a state court and Sterling Oil Company's equally strong preference for a federal court. To understand our resolution of these competing interests in the two present appeals we find it necessary to repeat a small portion of the voluminous procedural history of this case.[1]

I. *Factual Background*

In 1963 Jett and Chamberlain brought suit against Sterling Oil in the Circuit Court of Mobile County, Alabama, seeking a declaratory judgment as to the validity of the "Sterling Agreement,"[2] or, in the alternative, a favorable construction of that agreement. (This case will be referred to as the Jett-Chamberlain ac-

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[1]The merits of the dispute, the extent that they concern us, are adequately set out in our 1966 opinion. 362 F.2d 723.

[2]The Sterling Agreement entered into by Jett, Chamberlain, and Sterling Oil attempted to define the interests of these parties in an oil field purchased by Jett and Chamberlain. The Agreement is described in greater detail in 362 F.2d at 727.

tion.) There being complete diversity among the parties and an adequate amount in controversy, Sterling Oil removed the case to federal court. Soon thereafter, petitions were filed on behalf of Pack, Kahn, and Geo. H. Jett Drilling Company, among others, to intervene in the removed action; Jett and Chamberlain then moved to add these parties as plaintiffs, and, based on the anticipated granting of all these motions, moved to remand for lack of diversity jurisdiction. While the motions were pending, the three intervenors had a suit filed on their behalf, primarily against Jett, Chamberlain, and Sterling Oil, in the Circuit Court of Mobile County, Alabama. (This case will be referred to as the Pack-Kahn action.) The requested relief was identical to that sought in the Jett-Chamberlain action. Despite an apparent absence of complete diversity in the Pack-Kahn action, Sterling Oil removed it, alleging fraudulent joinder and the existence of a separable controversy.[3] Pack and Kahn then had motions filed to remand. On January 6, 1964, the district court denied the petitions to intervene and the motions to remand, and Jett, Chamberlain, Pack, and Kahn appealed.

Although the exact scope of our opinion disposing of these appeals is questioned it clearly decided two things. First, in the Jett-Chamberlain appeal we said that, since none of the non-party petitioners was an indispensable party, the district court's refusal to remand the case was proper. Secondly, in the Pack-Kahn

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[3]Sterling Oil also filed a suit against Jett and Chamberlain in federal court asking for various forms of relief under the Sterling Agreement that amounted to the same relief sought in its counterclaim in the Jett-Chamberlain action.

appeal we held that, on the state of the record as it existed then, there was no clear and persuasive evidence of fraud inherent in the bringing of that action while motions to intervene in the Jett-Chamberlain action were still pending; we thus ordered the Pack-Kahn action remanded.

With the decision made that the federal forum was appropriate for one action and inappropriate for the other, the opinion concluded:

> The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

362 F.2d at 730.

As all parties now concede, our decision signaled the start of a race to the courthouse. Despite our signal, which was supposed to remove the brakes from the wheels of justice, it took an additional five years for either of the cases to get in gear. The interim saw a great deal in the way of sparks — extensive discovery, another unsuccessful removal, and interminable procedural squabbling — but little motion down the road to a decision. Finally, in February 1971, the district court, on its own motion, began pre-trial proceedings that were intended to lead to a federal trial beginning July 12, 1971. In response to this federal

warm-up, Chamberlain's group[4] filed in the state court a motion to have the Pack-Kahn action set for trial before the Jett-Chamberlain action; it ultimately was set for trial May 4, 1971. Sterling Oil in turn reacted to this development on April 15, 1971, by asking the district court for a preliminary and permanent injunction against the state court proceeding. On April 20, 1971, the district court heard argument on the motion for preliminary injunction and on April 28, 1971, denied relief. Sterling Oil appealed this denial, but was unsuccessful in obtaining an injunction pending appeal from either the district court or this court.[5] Subsequently this appeal was dismissed for lack of prosecution.

With the final impediment removed, the state court began six weeks of hearings in the first phase of its trial — determining the validity *vel non* of the Sterling Agreement — and on July 10, 1971, that court entered an interlocutory decree finding it valid. Having made extensive, although at that point unsatisfactory, progress in the resolution of several substantial questions and having invested considerable time, Chamberlain's group on July 12, 1971, the day the federal trial was to begin, filed a motion in the district court to stay the federal proceedings pending a final determination

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[4]The term "Chamberlain's group" has reference to the apparent control given Chamberlain over the two related cases by virtually all interested persons, except of course Sterling Oil. This control is apparent from the deposition of Pack, Kahn, and Jett, and from an agreement entered into between Chamberlain, Cornwall, Citronelle Properties, Inc., and The Equity Corporation. See Part II A of this opinion *infra*.

[5]Sterling Oil also applied for prohibitory relief in the Alabama Supreme Court. After a hearing on April 30, 1971, that application was denied on May 3, 1971.

in the state court. After hearings on July 12 and 14, the district court granted that motion. Additionally, at the hearing on July 14, Sterling Oil's petition for permanent injunction filed on April 15, 1971, was submitted to the court without further argument; this petition was denied July 16, 1971. Sterling Oil's appeal from this denial is before us as appeal number 71-2745.[6]

Free of the complications that a simultaneous federal trial would have caused, the state court reconvened on August 2, 1971, for phase two of its trial. After weeks of hearings, that court issued its final decree November 4, 1971. Withdrawing its interlocutory decree of July 10, it found the Sterling Agreement to be unenforceable, but subsequently held that Sterling Oil was entitled to a finders fee and reasonable compensation for services totaling in excess of $500,000. This decree was incorporated into the pleadings of the Jett-Chamberlain action and on January 27, 1972, the district court granted the Chamberlain group's motion for summary judgment based on the res judicata effect of the state court decree. Sterling Oil's appeal from the summary judgment is before us as appeal number 72-1637.[7]

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[6]Sterling Oil later amended its Notice of Appeal to include the district court's order of July 14, 1971, which granted a stay of the federal proceedings. *See* footnote 12 *infra*.

[7]The federal action filed by Sterling Oil (see footnote 3 *supra*) had been consolidated with the Jett-Chamberlain action for trial and was included within the scope of the district court's order granting summary judgment.

II. *Number 71-2745*

Separated from the chaff, Sterling Oil's argument essentially is that its right to proceed in a federal forum has been frustrated by the district court's refusing to halt the pending state court action. Recognizing that in order to be entitled to such an injunction it must come within the provisions of 28 U.S.C.A. § 2283.* Sterling Oil has advanced four theories in support of its position. Our examination of these theories, however, must proceed from a proper awareness of the potential state-federal conflicts generated by that section and its predecessors, as recently explained by the Supreme Court in *Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers*, 1970, 398 U.S. 281. The Court there cautioned against loose construction of the exceptions to section 2283, and stated that any doubts about the propriety of such a federal injunction should be resolved in favor of permitting the state courts to proceed, "with relief from error, if any, through the state appellate courts and ultimately this Court." 398 U.S. at 287. This statement is particularly relevant where, as is the case here, the final state judgment is currently on appeal in the Alabama state court system.

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*28 U.S.C.A. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

A. *Fraud*

Because no Act of Congress expressly authorizes an injunction in this situation, Sterling Oil has relied primarily upon qualifying under the "where necessary in aid of its jurisdiction" language, one of the other two exceptions to section 2283. It first argues that the Pack-Kahn action, filed after the district court had obtained jurisdiction over the Jett-Chamberlain action by removal, raised identical issues and was a fraudulent attempt by Chamberlain to defeat federal jurisdiction. Because a federal district court after removal may enjoin further state proceedings in that action by a plaintiff (*see Lowe v. Jacobs*, 5 Cir. 1957, 243 F.2d 432, *cert. denied*, 355 U.S. 842, *Peters v. Standard Oil Co.*, 5 Cir. 1949, 174 F.2d 162, and *Armstrong v. Alliance Trust Co.*, 5 Cir. 1942, 126 F.2d 164), Sterling Oil argues that a federal court should enjoin a state proceeding fraudulently brought by the original plaintiff but in the name of third persons, if that action is in fact merely an attempt to litigate in state court the same issues already removed.

The evidence in the record upon which Sterling Oil bases its allegations of fraud is of two kinds. First there are depositions of Pack, Kahn, and Jett which show that, although they were financially interested in the dispute with Sterling Oil, they did not follow the litigation closely and did not originate the idea of either intervening in the Jett-Chamberlain action in federal court or bringing the Pack-Kahn action in state

court.[9] Instead each individual stated that his interests were similar to Chamberlain's and that he had given Chamberlain general authority to act on his behalf in the litigation. The second kind of evidence is documents showing that Chamberlain acted on this authority to retain counsel for his "group" and to have that counsel file the Pack-Kahn action.[10]

At two different times in 1966 we had occasion to consider partially developed allegations of fraud in the Pack-Kahn action. On the first appeal, confronted only with the fact that the action had been filed while the plaintiffs' petitions to intervene were still pending, we invoked the hornbook rule that "fraud is never presumed but must be established by clear and persuasive evidence" and concluded that no fraud had been proved. After the Supreme Court had denied certiorari on that appeal, Sterling Oil moved this court to recall its mandate, claiming that the just completed Jett deposition raised "serious questions" as to the true motivation behind the bringing of the Pack-Kahn action. This motion was denied.

Sterling Oil now says that all the evidence of fraud is before us and asserts that "the admissions of Pack, Kahn and Jett conclusively establish that the only pur-

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[9]Despite indications in the record that some other parties had intended to join as plaintiffs in the Pack-Kahn action, the only named plaintiffs were Pack, Kahn, and Geo. H. Jett Drilling Company, which was controlled 100% by Jett.

[10]This same counsel also apparently prepared and filed the Jett-Chamberlain action, prepared and filed the petitions to intervene in that action, and assisted in the preparation of the answer of several defendants to the Pack-Kahn action. All of these services were billed to Chamberlain.

pose of the Pack-Kahn action was to deprive Sterling Oil of Sterling's federally created right to have the Jett-Chamberlain-Sterling controversy decided in a federal forum." We disagree. As we stated on the first appeal:

> "There was good reason for bringing the second suit in order to assure the plaintiffs therein [Pack, Kahn, and Geo. H. Jett Drilling Company] a day in court in the event that they were not admitted as parties plaintiff in the earlier suit, as indeed they were not. The question is whether they have stated a cause of action against any of the defendants whose presence in the litigation would destroy complete diversity of citizenship of the parties. We think they have."

362 F.2d at 729-30. The now apparent fact that Chamberlain controlled both pieces of litigation is cause for serious concern, but it does not constitute "clear and persuasive evidence" of fraud. Chamberlain had been given authority to act for Pack, Kahn, and Jett and he was justified in bringing a suit in their names to protect their interests.

B. *Quasi In Rem Jurisdiction*

Sterling Oil's second ground for seeking an injunction as "necessary in aid of [the federal court's] jurisdiction" is its argument that the Jett-Chamberlain action is quasi in rem and that once the federal court took jurisdiction of that case, it was required to protect

it by enjoining a state action which raised identical issues. *See generally Pacific Indemnity Co. v. Acel Delivery Service, Inc.*, 5 Cir. 1970, 432 F.2d 952, *cert. denied*, 1971, 401 U.S. 955. Sterling Oil contends that the action is one to settle title to and rights in certain property, that it asked for an accounting in its counterclaim and later has requested specific performance, and that the whole agreement gave it an equitable lien and imposed a constructive trust on Jett and Chamberlain.

To dispose of this quasi in rem contention we need only look to the first appeal in this case and to the assertions of the parties before the court at that time. Although the legal questions there centered on the indispensability of certain parties, much of the argument was directed at determining whether the Jett-Chamberlain action was in rem, quasi in rem, or in personam. In an attempt to defeat the arguments as to indispensability of parties, Sterling argued throughout its briefs that the Sterling Agreement was carefully drawn to make the obligations of Jett and Chamberlain *personal* obligations, that the Agreement was a mere contract to pay money and transfer oil royalties, and that the Agreement clearly stated that it did not operate as a conveyance to Sterling of any interest in the leases or any other estate in land. Jett and Chamberlain, on the other hand, maintained that the controversy unquestionably concerned an interest in land From this Sterling now argues that, becuase we stated in the first appeal that the Sterling Agreement bound Jett and Chamberlain to convey "certain 'overriding royalties' and other interests in properties," we reject-

ed its earlier contentions that the action was in personam, 362 F.2d at 727; thus it concludes that it is not precluded from adopting a new argument after its initial argument was rejected. We find little merit in this contention.

There is nothing in our first opinion which would indicate that we rejected the in personam theory advanced by Sterling Oil. Sterling Oil argues that we held that the Sterling Agreement purported to convey interests in real property; actually we held that the Agreement bound *Jett* and *Chamberlain* to convey such interests at some later date. If our earlier decision can be read to have any effect on the question of the status of the Jett-Chamberlain action, it would be that the opinion is more consistent with Sterling Oil's first line of argument than it is with Sterling Oil's new position. It is inconceivable that this court would have allowed the Pack-Kahn action to be remanded if, after extensive argument on the quasi in rem-in personam argument, it in fact had concluded that the action was one which required the exclusive jurisdiction of the federal court. Sterling Oil has argued one position before this court and now, after obtaining the benefit of that position, has advanced an admittedly inconsistent position in hopes of prevailing again. We hold that it is precluded from utilizing such a tactic. *Cf. Scarano v. Central R. Co.*, 3 Cir. 1953, 203 F.2d 510; *Iselin v. La Coste*, 5 Cir. 1945, 147 F.2d 791; *Texas Co. v. Gulf Refining Co.*, 5 Cir. 1928, 26 F.2d 394, *cert. denied*, 278 U.S. 625.

C. *Partial Summary Judgment*

As an alternative basis for reversal Sterling Oil argues that, because of a partial summary judgment entered by the district court on November 3, 1966, in the Jett-Chamberlain action, an injunction should have been issued "to protect or effectuate its judgment." We hold that this judgment is not within the scope of the third exception of section 2283.

Jett and Chamberlain's original complaint alleged that the Sterling Agreement was null and void because Sterling Oil had not qualified to do business in Alabama at the time the Agreement was entered into. Alternatively, they asked for a declaratory judgment construing the contract favorably to them. On August 19, 1966, Sterling Oil moved for a partial summary judgment on the sole question whether it had qualified to do business at the proper time; it also asked for a "declaratory judgment that the Sterling Agreement is a valid existing agreement ...." This motion was granted November 3, 1966, and the court's order found the Agreement to be a "valid, enforceable and subsisting agreement." That order, however, was supplemented by a new order on November 15, 1966, which explained that the court's earlier order was only intended to dispose of the question of Sterling's qualifying to do business. The November 15 order continued:

> in using such language [as to the validity of the Agreement] the court had no intention of determining the meaning or enforceability *vel non* of any of the specific provisions of the Ster-

ling Agreement which are the subject of controversy between the parties to this cause.

If any doubt remained as to the limited scope of this order, it was removed on March 11, 1971, when the district court denied Sterling Oil's motion, based on the partial summary judgment, to strike amendments to Jett and Chamberlain's complaint and answer to counterclaim. These amendments, filed April 17, 1968, questioned the validity of the Sterling Agreement on grounds of fraud, misrepresentation, duress, and business compulsion. Thus, the district court refused to give its 1966 order final res judicata effect on the question of the validity of the Sterling Agreement. That it was not necessary to protect this "judgment" by an injunction is also apparent from the state of the record on July 16, 1971, the date the injunction was denied. At that time both the district court and the state court had found the Sterling Agreement valid insofar as Sterling Oil's having qualified to do business was concerned. No conflict existed and, in the absence of any other reason for protecting the partial summary judgment, the district court had rendered no judgment that warranted protection under section 2283.

D. *Pendency of Two Suits*

Finally, Sterling Oil contends that, under Alabama law, the pendency of both a state and a federal case involving the same parties and issues is vexatious as a matter of law and argues that this entitles it to an

injunction of the state proceeding.[11] Regardless of the Alabama law on this question, it is clear under federal law that the dual court structure of our federal system creates a situation in which the same case can be heard simultaneously in a state court and a federal court. *See e.g., Kline v. Burke Construction Co.*, 1922, 260 U.S. 226. We recognized that this was such a case in our first opinion. 362 F.2d at 730. Since the determination whether a federal injunction of a state proceeding should issue under section 2283 must be made by reference to federal law, we conclude that two such actions can proceed concurrently so long as it has not been demonstrated that either is in rem or quasi in rem.

Taken separately, none of Sterling Oil's theories properly entitle it to an injunction against the state proceeding; even when viewed collectively they fail to establish the impropriety of the state action necessary to overcome the restrictive construction placed on section 2283 by *Atlantic C.L.R.R., supra.*[12]

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[11]Sterling Oil cites for this proposition, *Watson v. Mobile & O.R.R.*, Ala. 1937, 173 So. 43, which states that the pendency of the *federal* case may be pled in abatement in the *state* action. *See also Fegaro v. South Central Bell*, Ala. 1971, 252 So.2d 66.

[12]Sterling Oil has also attempted to attack, by amended notice of appeal in No. 71-2745, the validity of the district court's order of July 14, 1971, staying the Jett-Chamberlain action. *See* footnote 6 *supra*. In addition to there being a serious question about whether the order was appealable (see *Jackson Brewing Co. v. Clarke*, 5 Cir. 1962, 303 F.2d 844, *cert. denied*, 371 U.S. 891), Sterling Oil's amended notice of appeal was filed far beyond the time limit allowed for such notices by Fed. R. App. P. 4(a). The order was entered on July 14, 1971, but the amended notice of appeal was not filed until November 1, 1971. As such this aspect of appeal No. 71-2745 is dismissed.

III. *72-1637*

Sterling Oil has advanced only one argument as to why, with the Jett-Chamberlain action stayed and the Pack-Kahn action free to proceed, a final judgment in the latter should not be res judicata in the former. It contends that the district court considered the July 10, 1971, order of the state court res judicata and that the parties agreed on July 14, 1971, to raise no "new issues" in the state court if that action were allowed to continue. This statement, while correct, does not aid Sterling Oil. The July 10 state court order was virtually identical to the November 15, 1966, partial summary judgment in the district court, and dealt with Sterling Oil's having qualified to do business. While withdrawn by the state court's final judgment, it was not contradicted; instead the Sterling Agreement was invalidated on grounds which had already been incorporated in the federal pleadings prior to July 14, 1971 and which were therefore not "new" in terms of the parties' agreement. Because it was conceded that the Pack-Kahn action raised issues which were identical to those raised in the Jett-Chamberlain action, we hold

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In its argument on the propriety of this stay order, Sterling Oil made an oblique reference to the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq. To the extent that this argument is addressed to the stay order, the above dismissal disposes of it. If, however, Sterling Oil is arguing that this Act supports in some way its request for an injunction, we need only point out that the Act provides no independent right to a federal forum. *See Ballantine Books, Inc. v. Capital Distributing Co.*, 2 Cir. 1962, 302 F.2d 17; *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 2 Cir. 1961, 287 F.2d 382, *cert. denied*, 368 U.S. 817; *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 2 Cir. 1959, 271 F.2d 402, *cert. granted*, 1960, 362 U.S. 909, *petition for cert. dismissed per stipulation*, 364 U.S. 801.

that the district court correctly granted summary judgment in the Jett-Chamberlain action based on the final state judgment in the Pack-Kahn action.

Number 71-2745 is dismissed in part and affirmed in part, and number 72-1637 is affirmed.

ORDER DENYING MOTION FOR REHEARING FIFTH CIRCUIT COURT

(March 30, 1973)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1972

No. 71-2745

D. C. Docket No. 3010-63

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Appellees,
versus

ALBERT BARNES ZINK, as Individual Trustee
for Sterling Oil of Oklahoma, Inc.,
Defendant,
STERLING OIL OF OKLAHOMA, INC., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Alabama

Before COLEMAN, AINSWORTH and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the amended notice of appeal filed November 1, 1971 be, and the same is hereby dismissed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1973

Issued as Mandate: Apr 9, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1972

No. 72-1637

D. C. Docket Nos. CA 3010-63 & 3192-63

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Third Party
Plaintiffs-Appellees,
versus

ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Defendant,
W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Defendants-Appellants,
CORNWALL TRADING CORPORATION, ET AL,
Third Party Defendants-Appellees.

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ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Plaintiff,
W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Plaintiffs-Appellants,
versus
G. H. JETT and BART B. CHAMBERLAIN, JR.,
Defendants-Third Party Plaintiffs-Appellees,
CORNWALL TRADING CORPORATION, ET AL,
Third Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Alabama

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Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-third party plaintiffs-appellees and third party defendants-appellees the costs on appeal to be taxed by the Clerk of this Court;

It is further ordered that plaintiffs-appellants pay to defendants-third party plaintiffs-appellees and third party defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1973

Issued as Mandate: APR 9 1973

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

(Number and Title Omitted)

Filed: April 28, 1971

The facts of this "convoluted" case were well summarized by the Fifth Circuit in *Jett v. Zink*, 362 F.2d 723 (5th Cir. 1966). The case has now been set for trial by this court; this setting has set off a surge of activity by all concerned. When the trial date was announced plaintiffs, counter-claim defendants (Jett-Chamberlain) obtained a trial date for the sister state court litigation (identified as the Pack-Kahn suit by the Fifth Circuit); the state court trial is set earlier than the federal. This earlier setting has induced the defendants, counter-claim plaintiffs (Sterling) to move this court to enjoin the state trial.[1]

Any motion for a federal injunction against a state court suit must first meet the requirements of 28 U.S.C.A. §2283. This section forbids federal stays [429] of state cases except in three circumstances: (1) when specifically authorized by Congress, (2) when necessary to aid the federal court's jurisdiction, and (3) to effectuate the federal court's order. There has been no suggestion that the first exception applies to this case; the requested injunction must, therefore, come within the second or third exception if it is to be issued. *Atlantic Coast Line R. Co. v. Brotherhood*

[1]Sterling also filed a plea in abatement in state court which was denied.

of Locomotive Engineers, 398 U.S. 281, 90 S. Ct. ___, 26 L.Ed.2d 234 (1970).

Simply because a federal court has taken jurisdiction of a case does not mean that it can enjoin all state proceedings between the same parties over the same issue. Only when one court has exclusive jurisdiction over the *res* in an *in rem* or *quasi in rem* action can concurrent adjudication of state and federal suits be stopped; even in that situation the federal court must have acquired jurisdiction first to warrant the issuance of the injunction. *Penn. General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 55 S. Ct. 386 79 L.Ed. 850 (1935).

The court concludes that the present action is *in personam* and that the court is without jurisdiction to issue the desired injunction. In so concluding the court is primarily persuaded by Sterlings statement of its cause of action filed March 3, 1971, in response to this court's preliminary pretrial order. In that document Sterling requests, in addition to money damages, [430] declarations and orders requiring the transfer of "overriding royalties of one sixty-fourth (1/64) of seven eighths (7/8) of all oil, gas and other minerals" taken from "non-producing leases." Additionally, Sterling requests declarations and orders requiring transfer of interests in producing leases or producing property.

In sum, Sterling is requesting the court to interpret the Sterling agreement and order specific performance of the contract as interpreted. Money damages are requested for injuries already sustained and in lieu

of specific performance if performance is not possible. In this posture there is no necessity of this court having possession of the leases or properties. Sterling has agreed to take money damages as a substitute.

Sterling suggests that even if the action is *in personam* this court is authorized to enjoin the state proceeding to preserve its "unfettered authority to write a final decree," "to protect the right of a person to have a controversy determined by a federal court in a removed action," and "to prevent harassment of a federal litigant through even one state court proceeding." The cases cited by Sterling are clearly distinguishable from the present case, however. Even more important to this issue is the fact that the Fifth Circuit's opinion in the interlocutory appeal allowed the present concurrent litigation to proceed. *Jett v. Zink*, 362 F.2d 723, 730 (5th Cir. 1966).

[431] Sterling's argument can be construed to allege that the case falls within the third exception — to effectuate a judgment of this court. The court cannot adopt this as grounds for issuing the injunction. This court did issue a partial summary judgment on the validity of the Sterling agreement; this decree however did not dispose of the more complex issues of interpretation found in both the state and federal cases. In view of the fact that there has been no allegation that the state court will fail to give that decree whatever res judicata effect it requires, this court is not disposed to enter the requested injunction.

Based on the foregoing, it is ORDERED, ADJUDGED, and DECREED that:

(1) the motion for a preliminary injunction be, and the same hereby is, DENIED; and,

(2) the use of documents, depositions, etc., obtained through federal discovery, is permitted in the state trial subject to the state court's evidentiary rulings, on the condition that it will also be available for use in the federal trial scheduled for July 12, 1971.

Done, this the 28 day of April, 1971.

(Signed) VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM PROCEEDING ON JULY 14, 1971 IN DISTRICT COURT ON MOTION FOR STAY OF FEDERAL ACTIONS

This CAUSE coming on to be heard before THE HONORABLE VIRGIL PITTMAN, UNITED STATES DISTRICT JUDGE, for the SOUTHERN DISTRICT OF ALABAMA, on the 14th day of July, 1971, commencing at approximately 9:30 o'clock P.M.

* * * *

THE COURT:

I don't mean to cut you off. I don't think there is any question but if this case came on to me today and the State Court proceeding had not started, I would

not abstain. I don't think there are such legal questions that I should abstain in lieu of the State Court. And so I would go right ahead. I have been very concerned because of the fact that this case was on the State docket for so long and on this Court's docket for so long and no action was taken by the movants, the petitioners — Mr. Jett and Mr. Chamberlain — to activate the State Court until this Court activated it. Now, the attorneys say if any action had been initiated by Sterling they would have done the same thing to me. That is no answer. There has been for some reason no pressing by any party — Jett and Chamberlain, or Sterling — to really move the litigation. I do not know, and I really don't intend to inquire as to why neither party has pressed or sought to have these issues litigated. [599] I have already stated my reasons, and I am not going to repeat that, of initiating the action and why I was as late as I was in initiating the action. Now, there is one other question I want to ask the Plaintiffs. There has been a lot of late filing of counter claims and amendments — extremely late — I have permitted them and let them come in. Of course nobody knows how the State Court action is going. In a sense you have won more than half of the battle. You have won the first big battle in State Court, because if they had won that battle, you would be gone; you would be out of it. Without going into the facts and how the facts will determine the rest of the thing it seems the other big point as to whether or not the disclaimer is a release of all of it — and I have given you my views; that it would not be — that most of it would be Pro Tanto. So — but the factual situation may change that. But as a principal of law it looks to me that the law is pretty clear that the most it

could be would be Pro Tanto. Now, because for some unknown reason this thing has moved so [600] slowly I am unwilling for this case to continue at this snail's pace in the future. So what — and by the history of the case I would not be surprised that if judgments went against the Plaintiffs in the State Court — Jett and Chamberlain — and then the question of whether it's Res Judicata which would be favorable to you at that stage, to seek some omitment and bring in some issues and to try to create somthing to keep it from being Res Judicata. Now, gentlemen, I want a statement from you as to whether or not there are to be any amendments or trying to change the cause of action to keep it from being Res Judicata in that Court down there, because really the thrust of your stay depends on whether or not that case will be Res Judicata or not.

MR. LYONS:

Is Your Honor concerned with subsequent efforts to inject new issues?

THE COURT:

Yes. I certainly am. So that the Court can litigate issues that you have failed — in the event [601] you failed to carry your day in the State Court.

MR. ODOM:

Not from our point.

MR. LYONS:

Not from Cornwall.

MR. PIPES:
Not from Pack and Kahn.

THE COURT:
Is that right, Mr. Chamberlain?

MR. CHAMBERLAIN:
That is correct, sir.

THE COURT:
Now, is there anybody who speaks for Mr. Jett?

MR. MATRANGA:
Yes. I represent him.

THE COURT:
Is Mr. Jett here?

MR. MATRANGA:
He is sitting in the Courthouse.

MR. PARKMAN:
Judge, if we should suffer an adverse final judgment in State Court, of course, we do not wish to be understood that we would not appeal that [602] judgment to the Supreme Court of Alabama.

THE COURT:
I am not saying you won't appeal it, but it's my understanding that your position has been that it's Res Judicata once the Circuit Court has rendered a judgment as far as this Court is concerned. Is that right?

MR. PARKMAN:
Yes, sir.

MR. ODOM:
Your Honor, we have no intentions of any counterclaim —

THE COURT:
Any amendments; inject new —

MR. ODOM:
It's our position we want to try this case in the State Court and we are going to do it expeditiously.

MR. MATRANGA:
Perhaps you want to hear Mr. Jett say this, but it's our position, in Mr. Jett's presence, that we would recognize the Res Judicata and the issues to be resolved in the State Court if the [603] matters are allowed to be tried in State Court, and that we will inject no new issues that would be contrary to that decision in State Court.

THE COURT:
Is that right, Mr. Jett?

MR. JETT:
That is correct, sir.

MR. DARBY:
Your Honor, I think perhaps they already have issues in the State Court, or are trying raise them — I don't know whether they do or not — I don't know if they'll have any success with it because I don't think

factually they can sustain it. But there were statements made in the negotiations of settlement yesterday. We were told —

THE COURT:
Just a minute, Mr. Darby, they have just bound themselves that no new issues are to be raised that are not already before the Court. And I suspect that to be binding.

MR. REAMS:
We are talking about this case, of course, in the [604] Federal Court.

THE COURT:
Alright. Let's go a step further. Are you going to raise issues in the State Court that will distinguish this case from that one so it will not be Res Judicata?

MR. CHAMBERLAIN:
No, sir. Not that.

THE COURT:
Nor from Mr. Jett?

MR. JETT:
That is correct.

MR. ODOM:
We don't intend to waive any issues that are in the State Court.

THE COURT:
I mean so far as the pleadings now on file and presented to this Court.

MR. ODOM:
Absolutely.

MR. LYONS:
We will not be a party to any devious schemes.

[605] THE COURT:
Devious or otherwise; modified schemes. What I am doing, gentlemen, is trying to tie this down, and this is as slippery as an eel and like a can of worms. I recognize that law suits are adversary proceedings and that attorneys are going to do everything that is honorable to prevail. And I would expect them to. If I was practicing law I would do the same thing. But we all have some experience in Court proceedings, and we have some experience of when you lose one way you try to come back another way. And it would be unconscionable to me to grant a stay today and then let the thing, particularly so far as the moving parties are concerned with reference to the stay, to come back and if they suffer a defeat in the State Court say, well now, new things have come up, Your Honor, and we want to remand and it's now not Res Judicata. That would be an unconscionable position to take and this Court only wants this litigation settled in a Court of law. I have no particular interest as to whether it's settled in the State Court [606] or Federal Court. But it is old — it is too old — and again I come back that not one of the interested parties have taken any initiative to get this case tried. And the Court did it on its

own motion, feeling that it has — in the public interest, litigation should be moved along.

MR. DARBY:

Your Honor, may I say something? You had some question about what day you announced that this case was going to be tried. I made a notation of it. I think it was February 5th.

THE COURT:

I think their brief mentioned a time in February.

MR. DARBY:

And they made no effort whatsoever to proceed in a State Court until the day of Your Honor's —

THE COURT:

That is what has disturbed me.

MR. DARBY:

What in substance they are doing to me, and perhaps doing to the jurisdiction of the Federal Court, [607] depending on how Your Honor rules, you set aside enough time to prepare this case and you give us that

time, because you thought we needed it. You gave us the time to try it. They — then, after you had had your pre-trial — not before — after — they could have gone down to the State Court before then. Your pre-trial, I think, was April 5th. It was about a month after. The next day they go down to the State Court and get the State action set. Now, we had this action set. Their action was filed about three or four months before —

THE COURT:

Mr. Darby, I might say this; I recall no positive action that you took to this Court to get your case tried.

MR. DARBY:

I didn't ask your Honor to set it. There were motions on file. Quite a number had not been ruled upon. I figured Your Honor would rule on those motions in due time, and we were still in the process of taking discovery. We —

[608] THE COURT:

Well, if discovery is not completed since 1963. . .

MR. DARBY:

No, sir. I am not saying — we still have some discovery motions that I don't think Your Honor has ruled on until this day.

THE COURT:

I have interrogatories, and that's the only thing that I know of. And they were filed — and I forget who filed them — but they were filed so that the answers couldn't have been gotten in time.

MR. DARBY:

We answered the same interrogatories in the State Court, and they are in the process of being typed. We are not even objecting to them.

THE COURT:

Well, I frankly was not in too much sympathy with whoever proposed them, because if I had given you the full length of time to answer them it would have been past the trial date, and I think that that is not in the spirit of discovery being completed by the — and I say that, without [609] recalling who filed them.

MR. PARKMAN:

Judge, if I may, it was the third party Defendant who has just been allowed into the litigation.

MR. DARBY:

But we think that the removal statute does mean something. I think it is pretty clear who caused the second complaint to be filed in the State Court, and I think it is fairly clear as to why it was filed.

THE COURT:

I think all the attorneys on both sides have made every maneuver they can to try this case in the forum they wanted to try it in. And they have tried to defeat the other side; one from putting it in the forum they wanted it in, and there is no question of it and there is no question — and I take no umpirage that they moved it to try it in State Court. The only thing that I have disliked about it is that the movement was made after this court allotted in effect two months of it's

time in preventing me — with the docket that we have. Of course, I can put other [610] things in, but a substantial part of this time of two months that I've set aside for the handling of this — at that time it was all non-jury, and I anticipated having to write finding of facts and questions of law. And it's complicated. I don't know if I could have finished in two months time. But it has hampered this Court in the efficient use of its time that these developments have taken place. But I must also point out that not just them, but for some unknown reason no initiative was taken by the other side to get the case tried. So I think that we can pass out laurels and blame in equal portions to every body. Is there anything else anybody wants to say?

MR. DARBY:

I would submit your case was set first. It was announced in February, and what has occurred since that time at the instance of one of the parties shouldn't affect the trial of this case in this Court

THE COURT:

Well, I must say this; for them to take six days [611] on direct and you to take eighteen days on cross examination, I am not sure there wasn't some element of trying to carry the case so that it couldn't be completed and tried over here.

MR. DARBY:

Your Honor, the Court listened to the cross examination. The Court gave some time limits and the Court extended the time limits and I am sure the only reason the Court extended the time limits is because we were

producing information that was valuable to the Court. And I think the Court's decision shows that is what we did.

THE COURT:

Well, I am not going to criticize anybody about the way they handle a case. But I'd say that I think there has been about as much maneuvering in this case as there could be for the respective parties to adjudicate the case in the particular forums that they want it. I see nothing that is unethical in it. I must frankly say that I frown on the late development. If the initiative had been taken before this Court set it's thing then — and for that reason I have been [612] concerned about whether or not how fast the case is going down there and when it's going to be concluded. Now, in talking to Judge Robertson it is his judgment that he can finish the case in two weeks and render a decree immediately. And so I went a little further than that, and if I recall the conversation correctly, I said, Judge, — I believe he is to start the 26th, is that right?

MR. REAMS:

That is our understanding.

THE COURT:

I said, Judge, do you think by the outside you will have finished and can render a decree by the 15th of August — which is maybe an additional week — and he expressed that so far as what he knew about the case at that time — and I guess if he spent six weeks on it he knows a lot about it — that he doesn't have any real fear. Now, gentlemen, I am going to release this jury; declare a mistrial. I am going to let you go ahead and proceed down there. If for some unknown

reason, and without charging bad faith [613] to anyone, if that litigation is not concluded more or less along the schedule that is now set up I may very well set this case again the last part of November, and not later than January. And gentlemen, don't come back and say that you are pending in the State Court, because by that time you will have had a year, liking one month from the time this Court made its announcement, and so — and regardless of how that case goes down there I expect to hold this case as Res Judicata and dismiss it from the docket.

MR. DARBY:

Your Honor, what will you do if the Judge Robertson rules for one side or the other and the Alabama Supreme Court reverses it? Then we are going to be back just where we are.

THE COURT:

Then you can re-try it in the State Court down there — and there is authority that I can hold it Res Judicata. I understand the authority is split as to whether it is Res Judicata, but I am not going to wait for a year or two years — and [614] it has been known to go for three years through the Appellate Court processes. And so litigate it in the State Court. But I want it clear, gentlemen, that I think that I will be within my discretion that unless there is a final decree reasonably soon in this case, and since you have been put on notice that you can make your plans now to begin maybe the latter part of November, and certainly in January. I will try to give you at least six weeks notice. So, all I can say is be on your toes and finish that litigation. If not, then I take it for some unknown reason the mechanics of the State Court are not moving,

and that I don't know when it would be finished, and I would move it along in this Court. Alright, gentlemen.

ORDER

(Number and Title Omitted)

You are advised that on the 14 day of July, 1971, the following action was taken in the above-entitled case by Judge PITTMAN:

Motion to Stay filed on July 12, 1971, by Bart B. Chamberlain, Jr., G. H. Jett, Geo. H. Jett Drilling Co., Inc., Howard M. Pack, Joseph Kahn, The Equity Corporation, Cornwall Trading Corporation, Four States Drilling Co., Inc., James E. Kemp, Kemp Oil Co., Inc., and Big Four Oil Co., Inc., is hereby GRANTED.

WILLIAM J. O'CONNOR
CLERK,
(Signed) JOHN O'BRIEN
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

ANCORA CORPORATION, ET AL.

versus CA-No. 4033-66-P

JOHN E. STEIN, ETC., ET AL.

EXCERPT FROM ORDER ENTERED
NOVEMBER 15, 1971.

Most of the attorneys in these cases are also attorneys in the Jett and Chamberlain v. Zink, et al. cases, Civil Action Nos. 3010-63 and 3192-63. Those cases were filed in 1963. The court incorporates, and makes part of the records in these cases, its conferences concerning the dilatory action in those cases. There were cases pending in the Mobile Circuit Court of Alabama which had been filed shortly after the cases were filed in Federal court. The cases were complex and the expected trial time was one month or more. Because of these factors, the court gave several months advance notice of its setting the cases for trial. After this court's announced trial date, the attorneys in those cases for plaintiff Chamberlain secured an earlier trial setting in the state court and began the taking of testimony prior to the setting in this court. Therefore, when the cases were called for trial in this court, it was necessary to stay the action here pending the outcome in the state court. In order to insure that the cases in the state court would proceed to a conclusion, this court advised the parties that unless the cases were concluded within a given period of time, this court

would proceed with the trial of the cases in this court. The deadlines have not been met in the state court, although I have been informed that a judgment is expected in the near future and before the first of December. Several of the same attorneys for Chamberlain in the concurrent cases in the state court are attorneys [934] for Chamberlain and movants herein to add and drop parties. The purpose of these observations is to show the maneuvering and scurrying around with reference to the trial of those old cases to select their forum whereas no action had been taken to bring the cases to trial in the state court prior to the announced trial date in this court. This also indicates the difficulty the court is experiencing in bringing the cases sub judice to trial.

* * * *

ORDER GRANTING
SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: Jan. 27, 1972

This cause having come on to be heard in open court on the 10th day of December, 1971, on the motion for summary judgment heretofore filed by G. H. Jett and Bart B. Chamberlain, Jr. on December 2, 1971; and on January 21, 1972, the motion of Cornwall Trading Corporation; the Equity Corporation and Richard E. Peck as successor Trustee for the Equity Corporation filed December 9, 1971, and the motion of Howard M.

Pack and Joseph Kahn filed December 6, 1971, and on the various motions of any other parties hereto joining in the aforementioned motion for summary judgment and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the [920] court having examined the pleadings, evidence and other matters before it on the aforesaid motions and after oral argument and the submission of briefs by counsel for the parties hereto:

FINDINGS OF FACT

1. The basis of the litigation in these causes, and the basis of the litigation in that certain lawsuit styled *Howard M. Pack, et al. vs. Albert Barnes Zink, etc., et al.*, Case No. 60,357, Circuit Court of Mobile County, Alabama, in Equity (herein called the "Pack-Kahn Action") are the same.

2. All of the parties to these causes are also parties in the Pack-Kahn Action.

3. All of the issues involved in these causes are also involved in or are within the scope of the issues in the Pack-Kahn Action.

4. By final decrees of November 4, 1971 and November 29, 1971, entered in the Pack-Kahn Action, the Circuit Court of Mobile County, Alabama, entered a money judgment in favor of Sterling Oil of Oklahoma, Inc. and its individual trustees.

CONCLUSION OF LAW

1. The aforesaid final decrees of the Circuit Court of Mobile County, Alabama, dated November 4, 1971 and November 29, 1971 entered in the Pack-Kahn Action, constitutes a final judgment in that cause which (a) disposes of the rights and liabilities of the parties and is determinative of the issues and matters involved in these causes; (b) is binding and conclusive on the [921] parties to these causes; and (c) is therefore *res judicata* and operates as a bar to any further proceedings herein.

Based upon a consideration of the foregoing facts and conclusions of law, the court is of the opinion that G. H. Jett and Bart B. Chamberlain, Jr. and the other parties who have filed the various motions for summary judgment are entitled to the relief prayed for therein as a matter of law, and

It is therefore ORDERED, ADJUDGED and DECREED that the said motions be, and the same hereby are, GRANTED.

Done, at Mobile, Alabama, this the 27 day of January, 1972.

VIRGIL PITTMAN
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21282

GEORGE H. JETT, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ET AL.,
Appellees.

No. 21283

HOWARD M. PACK, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ETC., ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Alabama.

(June 23, 1966.)

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

WOODBURY, Senior Circuit Judge: This convoluted litigation began with a suit in the Circuit Court of Mobile County, Alabama, for a declaratory judgment as to the validity, and if valid the meaning, of a contract referred to by the parties and hereinafter as the Sterling Agreement. The plaintiffs were Bart B. Chamberlain, Jr., a citizen of Alabama, and G. H. Jett, a citizen of Louisiana. The defendants were Sterling Oil of Oklahoma, Inc., a Delaware corporation having its

*Senior Judge of the First Circuit, sitting by designation.

principal place of business in Oklahoma, and Albert B. Zink, a citizen of Pennsylvania, and Herbert C. Smyth, a citizen of New York, both as individual trustees of Sterling. There being complete diversity of citizenship of the parties and clearly an adequate amount in controversy, the suit was removed to the United States District Court for the Southern District of Alabama.

At this juncture Howard M. Pack and Joseph Kahn, both citizens of New York, and Geo. H. Jett Drilling Co., a Delaware corporation, with the consent of Chamberlain and Jett, moved for leave to intervene as indispensable parties plaintiff, and Chamberlain and Jett moved for an order making Cornwall Trading Corporation, a Delaware corporation, and Four States Drilling Company, Inc., a Texas corporation, involuntary parties plaintiff. In anticipation of the granting of the motions for leave to intervene and the motion to add involuntary parties plaintiff, Chamberlain and Jett moved to remand to the state court on the ground that with the entrance into the litigation of indispensable parties plaintiff complete diversity of the citizenship of the parties would no longer exist.

While these motions were under submission in the court below, Pack, Kahn and Geo. H. Jett Drilling Co. brought suit in the Circuit Court of Mobile County, Alabama, against Zink, Smyth, Sterling Oil, Jett, Chamberlain, Cornwall, Four States and others who need not be mentioned for the same relief as that sought in the earlier suit described hereinabove. Zink, Smyth and Sterling removed this suit to the court below alleging fraudulent joinder of parties and the existence of

a separable controversy between them and Jett and Chamberlain. Pack, Kahn and Geo. H. Jett Drilling Co. moved to remand the suit to the state court from whence it came.

The court below without opinion denied all the motions listed above. Pack, Kahn and Geo. H. Jett Drilling Co. appealed from the denial of their motions for leave to intervene and Jett and Chamberlain appealed from the denial of their motions to add parties plaintiff and to remand. This appeal is No. 21,282 on our docket. Pack, Kahn and Geo. H. Jett Drilling Co. appealed from the denial of their motion to remand. This appeal is No. 21,283 on our docket. Both appeals are properly before this court under the provisions of Title 28 U.S.C. § 1292(b).

Originally there was complete diversity of citizenship between plaintiffs and defendants. Neither Jett nor Chamberlain was a resident of Pennsylvania, as was the defendant Zink, or of New York, as was the defendant Smyth, or of Delaware, where the defendant Sterling was incorporated, or of Oklahoma, where it had its principal place of business. With the case in that posture and the jurisdictional amount in controversy, removal was routine. However, should the proposed parties plaintiff be admitted, there would no longer be complete diversity of citizenship of the parties, for Cornwall and Jett Drilling are both Delaware corporations, as is the defendant Sterling, and Pack and Kahn are both citizens of New York, as is the defendant Smyth.

The appellees in No. 21,282 contend that the right to remove depends upon the case disclosed by the pleadings when the petition for removal is filed and that the subsequent addition of new parties is not to be considered on a motion to remand. The cases they cite in support of this proposition are not in point. On the contrary the law is clearly settled that in diversity cases the question of indispensable parties is inherent in the issue of federal jurisdiction and that indispensable parties must be joined, *sua sponte* by the court if need be, even though to do so destroys complete diversity of citizenship of the parties and ousts federal courts of jurisdiction under the rule of *Strawbridge v. Curtis*, 3 Cranch 267 (1806). *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U.S. 77 (1920); *The Baltimore and Ohio Railroad v. The City of Parkersburg*, 268 U.S. 35, 38 (1925); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 218, 219 (C.A. 5, 1946), *cert. denied*, 329 U.S. 782 (1946), *rehearing denied*, 329 U.S. 830 (1946).

The question then in No. 21,282 is whether the parties who sought to intervene, or who the original plaintiffs sought to have made involuntary plaintiffs, were so indispensable to the litigation that no court should proceed to final decision without them, that is to say, "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 Howard 129, 139 (1854), cited with approval in *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 48 (1909), and *Niles-Bement-Pond Co. v. Iron Moulders Union, supra*

80. And see *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 456 (1922), in which the Court said: "The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties."

We must, therefore, determine the nature of the interest in the litigation of any one of the persons or corporations whose presence in the suit would destroy complete diversity of citizenship of the parties. The nature of an interest in litigation depends upon the law of the state concerned, in this case Alabama, for: "In a diversity case, state substantive law will govern in determining the rights and interests of all concerned. After those rights and interests have been ascertained by state law, a federal court will determine indispensability of a party according to its own rules, taking into consideration whether justice can be done and complete relief afforded. This will depend, of course, on the substantive rights created by the state." *Hertz v. Record Publishing Co. of Erie*, 219 F.2d 397, 399, 400 (C.A. 3, 1955), *cert. denied* 349 U.S. 912 (1955). See also, 3 Moore, Federal Practice, ¶ 19.07. So much for the present for the law; we turn now to the facts as disclosed by the pleadings.

This litigation grew out of the purchase as of May 1, 1959, by Jett and Chamberlain from Gulf Oil Corporation of all of its producing and non-producing leases in, near or related to the Citronelle Oil Field in Mobile County, Alabama, and their simultaneous purchase from Gulf Refining Company of the Citronelle-Mobile Gathering System. The purchase was fi-

nanced in part by the reservation by Gulf Oil of a production payment and in part by loans from a New York bank secured by mortgages on the properties. Further financing was obtained by a loan from The Equity Corporation secured by a mortgage junior to those given to the New York bank which was guaranteed in part by Pack, Kahn and Cornwall in return for which they were given an interest in the properties.

As of the date of purchase, May 1, 1959, Jett and Chamberlain entered into the Sterling Agreement with Sterling Oil of Oklahoma, Inc. This is a long and complicated document. No useful purpose would be served by analysing it in detail. It will suffice to say that by the terms of the agreement the parties cancelled, annulled and terminated all agreements of every sort and kind previously made and entered into between them, that Sterling transferred to Jett and Chamberlain all of its rights, interests, claims and demands of every kind, character and description in return for which Jett and Chamberlain agreed to grant, transfer and convey to Zink as individual trustee for Sterling certain "overriding royalties" and other interests in the properties upon the occurrence of four events: (a) when the production payment carved out and reserved by Gulf Oil, which it had assigned to Olympic Oil and Gas Corporation, shall have been fully paid and satisfied; (b) when the production loan shall have been fully paid and satisfied; (c) when $500,000 of the amount borrowed from The Equity Corporation which Jett and Chamberlain had applied to the purchase of producing leases from Gulf Oil shall have been repaid, and (d) when Jett and Chamberlain shall have recovered all legal fees, printing costs and other expenses

incurred by them in connection with the financing referred to above.

As of the same date, May 1, 1959, Jett, Chamberlain, Cornwall (which apparently is the successor in interest of The Equity Corporation), Pack and Kahn entered into a supplemental agreement, so called. This agreement recites that by a concurrent conveyance Cornwall had acquired an undivided 23% interest in the gathering system purchased by Jett and Chamberlain from Gulf Refining Co. and that Pack and Kahn together had acquired an undivided 5.75% interest in the system, that Cornwall by concurrent assignment of interest had acquired an undivided 20% interest in deep rights in the producing leases and Pack and Kahn together had acquired an undivided 5% interest in those leases, and it recites that under the Sterling Agreement Jett and Chamberlain had agreed upon the happening of certain events to convey to Sterling Oil's trustee, Zink, (i) an overriding royalty in each producing lease equal in value to 25% of a working interest in the lease, (ii) "certain percentages" of the gross profits of the gathering system, and (iii) an overriding royalty of 1/64 of 7/8 on each non-producing lease. The supplemental agreement then goes on to provide that Cornwall, Pack and Kahn "confirm" that their interests in the gathering system are "subject" to their proportionate share of the obligations to pay the "percentages of gross profits" of the gathering system to Sterling Oil, referred to in (ii) above, and that when the time comes for Jett and Chamberlain to convey to Sterling Oil the overriding royalty interest provided in the Sterling Agreement they will take "appropriate action" and deliver such documents as may be necessary "to

subject" their interests to the overriding royalties referred to in (i) and (iii) above, "if" Jett and Chamberlain shall concurrently convey to them (Cornwall, Pack and Kahn), without cost, "additional working interest" in each lease in which they have already acquired an interest in the amount which, when added to their present interest, will be equal to their present interests free of the burden of the overriding royalty granted to Sterling Oil Company under the Sterling Agreement.

The complaint alleges that after the purchase of the properties, production from the wells fell off to such an extent that it would have been impossible for Jett and Chamberlain to have made payments on the loans as payments fell due and that only because of the expenditure by Jett, Chamberlain, Cornwall, Pack and Kahn of $1,700,000 for reworking the wells was foreclosure of the mortgages on the properties avoided. And it is alleged in the complaint that reworking the wells so substantially increased oil production that if the complainants are allowed to recover the expense of reworking, plus interest, the net income of oil runs will be so great that the date of the transfer of overriding royalties to Sterling Oil under the Sterling Agreement will not be postponed beyond the date when the transfer would have taken place without the wells having been reworked and that, as of the date of transfer, the value of Sterling Oil's overriding royalty interest will be substantially greater than it would have been had the wells not been reworked.

So much for the present for Cornwall, Pack and Kahn. We turn now to the remaining allegedly indispensable parties.

Neither Geo. H. Jett Drilling Co., the Delaware corporation, nor Four States Drilling Company, Inc., the Texas corporation, is mentioned in the complaint. In its petition for leave to intervene as a party plaintiff, Geo. H. Jett Drilling Co. alleges that Jett and Chamberlain assigned all of their right, title and interest in approximately 975 leasehold acres from the non-producing leases they had acquired from Gulf Oil to Jett Drilling Co., Inc., another and apparently a separate corporation, and that Jett Drilling Co., Inc., assigned all of its right, title and interest in "a portion" of the 975 leasehold acres to Geo. H. Jett Drilling Co., the petitioner for leave to intervene, which it in turn had assigned to another corporation reserving to itself and its successors and assigns an overriding royalty interest "equal to or larger" than the 1/64 of 7/8 to be conveyed to Sterling Oil under the Sterling Agreement which, it is alleged, will "come out of and be deducted from the overriding royalty interest reserved" by the petitioner, Geo. H. Jett Drilling Co.

Jett's and Chamberlain's motion to add Cornwall and Four States Drilling Co., Inc., as parties plaintiff alleges, insofar as Four States is concerned, that it was "formerly Jett Drilling Co., Inc.," and that under assignments of "various portions" of the 975 leasehold acres other than those assigned to Geo. H. Jett Drilling Co. it had excepted and reserved an overriding royalty interest similar to that reserved by Jett Drill-

ing Co. in the assignments it had made of other portions of the leasehold acreage.

The relief requested by Jett and Chamberlain in their complaint is twofold. First they ask that the Sterling Agreement be declared null and void for the reason that Sterling Oil was not qualified to do business in Alabama when the Agreement was entered into[1] and as alternative relief they ask for a construction of the Sterling Agreement favorable to their interest. Specifically, they first ask for a valuation of the undivided percentage interests conveyed to Cornwall, Pack and Kahn and a declaration that the conveyance of those interests to them constituted an expense or cost incurred by the complainants (Jett and Chamberlain) in connection with the creation of equity financing referred to in the Sterling Agreement. Then they ask for a declaration that they and Pack, Kahn and Cornwall be allowed to recover the $1,700,000 spent for reworking the wells out of the net income of the oil runs prior to the time of transfer of the overriding royalty to Sterling Oil's trustee under the Sterling Agreement.

The long and short of the matter is that whatever rights the allegedly indispensable parties may have are "subject" to the rights of Sterling Oil. Thus, naturally, they, like the original plaintiffs, would like to

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[1]The Sterling Agreement was effective May 1, 1959, but it was not executed by the parties until after that date. Sterling Oil executed it in New York on May 26, 1959, Zink executed it in Pennsylvania on May 27, 1959, Sterling Oil qualified to do business in Alabama on August 6, 1959, and Chamberlain and Jett executed it in Alabama and Louisiana on August 17 and 18, 1959, respectively.

remove Sterling Oil from the scene by having the Sterling Agreement declared null and void and, failing that, to have the Agreement construed to their advantage. But this is not enough to make them indispensable parties. Their interests must be of such a nature that justice cannot be accorded the original parties before the court without injuriously affecting their rights.

Measured by this test the interests of those who would join or be joined as plaintiffs are not such as to make them indispensable parties. Should a decree be entered adverse to Jett and Chamberlain either as to the validity of the Sterling Agreement or as to its meaning, the rights of the absent parties would still be subject to the rights of Sterling Oil under the Sterling Agreement as the absent parties with knowledge of the Sterling Agreement agreed that they should be. Their rights would not be injuriously affected. On the other hand, should a decree be eventually entered in favor of Jett and Chamberlain on either issue the absent parties would stand to gain at least by a precedent. We do not see how, win, lose or draw, the rights of the absent parties could be injuriously affected by any decree that might be entered in the case. The rulings on the motions in No. 21,282 are affirmed.

We turn now to No. 21,283.

The case before us on this appeal involves the same parties, and others, and the same subject matter. But it presents a separate problem for consideration because the question now before us is not whether parties are indispensable but whether there has been a joinder of improper parties to defeat federal jurisdiction.

To recapitulate and amplify, the case now before us was not removable on the face of the complaint because complete diversity of citizenship of the parties did not there appear. The plaintiffs Pack and Kahn were citizens of New York and the plaintiff Geo. H. Jett Drilling Co. was for jurisdictional purposes a citizen of Delaware,[2] and the defendant Smyth is a citizen of New York, as are the plaintiffs Pack and Kahn, and the defendant Sterling Oil is a citizen of Delaware as is the plaintiff Geo. H. Jett Drilling Co. Zink, Smyth and Sterling Oil removed the case to the court below alleging that when properly realigned the only necessary parties plaintiff will be Jett and Chamberlain and the only necessary parties defendant will be themselves, Zink, Smyth and Sterling Oil, that all other named parties are merely nominal parties, and that a separable controversy exists between them and Jett and Chamberlain. Wherefore they assert that the action is one within the original jurisdiction of the United States District Courts under Title 28 U.S.C. § 1332(a)(1). The court below denied the motion of Pack, Kahn and Geo. H. Jett Drilling Co. to remand and it is their appeal that is presently under consideration.

The appellees, Zink, Smyth and Sterling Oil, contend that Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling Co. have attempted to deprive them of their federally created right to have the suit tried in a federal court by fraudulently and in bad faith joining other parties in order to defeat removal. They argue that this is conclusively established by the filing of

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[2]The location of its principal place of business is not alleged.

the second or Pack-Kahn suit while motions for leave to intervene, to add parties plaintiff and to remand in the earlier or Jett-Chamberlain suit were under submission in the court below. And they say that this is clearly established by the fact that Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling Co. are all represented by the same counsel. We do not agree.

It is horn book law that fraud is never presumed but must be established by clear and persuasive evidence. Moreover, there was good reason for bringing the second suit in order to assure the plaintiffs therein a day in court in the event that they were not admitted as parties plaintiff in the earlier suit, as indeed they were not. The question is whether they have stated a cause of action against any of the defendants whose presence in the litigation would destroy complete diversity of citizenship of the parties. We think they have.

As we have already pointed out, the rights acquired in the properties by Pack, Kahn and Geo. H. Jett Drilling Co., and the same may be said of the rights of Cornwall which probably should be realigned as a plaintiff, are "subject" to the rights acquired by Sterling Oil under the Sterling Agreement. Thus they have an obvious interest in the validity of the Sterling Agreement and in an interpretation of it to their advantage This brings them within the provisions of the declaratory judgment law of Alabama, Code of Alabama of 1940, Title 7, § 157 (1958), which so far as here material reads: "Any person interested under a . . . written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affect-

ed by a ... contract ..., may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status, or other legal relations thereunder."

But Sterling Oil insists that it has no quarrel with Pack, Kahn, Cornwall and Jett Drilling but only with Jett and Chamberlain and to remove any possibility of doubt as to this, Sterling Oil and its trustees, Zink and Smyth, a month before hearing in this court, filed a disclaimer of any right of action against Pack, Kahn, Cornwall and Jett Drilling arising out of the allegations in either complaint. This disclaimer is of no moment. It is not for defendants to shape plaintiffs' cases. No doubt most defendants would like to escape trial and possible liability by disclaiming any right of action against a plaintiff. That is not the point. The question is whether a plaintiff has stated a cause of action against a defendant. And that these plaintiffs have done as appears hereinbefore.

The question remains whether this case, No. 21,283, falls within the scope of Title 28 U.S.C. § 1441(c) which provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951), the Court said that under § 1441(c), introduced into the Code in 1948, a separable controversy is no longer an adequate ground for removal unless it also constitutes "a separate and independent cause of action." And it said at page 14 that ". . . where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." It is the joinder of claims, not the joinder of parties, that makes § 1441(c) applicable. See 1A Moore's Federal Practice ¶ 0.163[4-5]. And here all plaintiffs including those who would be plaintiffs upon realignment of parties according to interest, assert the same claim, *i.e.*, that the Sterling Agreement is invalid and, in the alternative, if valid, should be construed in a way favorable to their interest. There simply are not "separate and independent claim or causes of action" alleged. The case must be remanded to the court from whence it came.

The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

No. 21,282 is affirmed. No. 21,283 is reversed.

APPENDIX C

IN THE CIRCUIT COURT
MOBILE COUNTY, ALABAMA

PACK, ET AL.

versus Case No. 60,357
In Equity

STERLING, ET AL.

MOTION

Comes now the Respondent and Cross-Complainant, Bart B. Chamberlain, Jr., and respectfully moves the court as follows:

(a) To set for Friday, March 12, 1971, the argument on demurrers which were filed on July 2, 1968 to the Pleas in Abatement which were filed on May 3, 1968 by the Respondents and Cross-Respondents James, Smyth and Sterling.

(b) To set this cause down for trial on the merits on May 3, 1971, unless its order shall be one over-ruling demurrers to the Plea in Abatement, and to order that on or before April 15, 1971, all parties file their answers, demurrers and other pleadings, each party to incorporate all his or its pleadings in a single document.

As grounds for this motion, movant respectfully shows that this action was commenced in this court on July 5, 1963; that on or about August 5, 1963, on

the petition of Zink, Smyth, and Sterling, it was removed to the United States District Court for the Southern District of Alabama; that on or about January 6, 1964 the United States District Court denied the motion of the complainants to remand the cause to this court, but found that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion, whereupon the complainants appealed to the Fifth Circuit Court of Appeals, and on, to-wit, June 23, 1966, the United States Circuit Court of Appeals for the Fifth Circuit entered its order reversing the order of the U. S. District Court and ordered the cause remanded to the state court.

Thereafter the Respondents and Cross-respondents, Zink, Smyth and Sterling, applied for certiorari to the United States Supreme Court, where certiorari was denied on December 12, 1966.

Subsequently, and on January 24, 1967 this cause was remanded from the U.S. District Court to this court in compliance with the mandate of the U. S. Fifth Circuit Court of Appeals, but subsequently and after the movant had filed his cross-bill of complaint herein, the Respondents and Cross-respondents, Zink, Smyth, and Sterling, again removed this cause to the U. S. District Court and not until March 15, 1968 was this cause finally remanded to this court.

Thus by successive removals and other dilatory actions the Respondents and Cross respondents, Zink, Smyth and Sterling, have delayed a final disposition of this case for almost five (5) years. (August 5, 1963 — March 15, 1968).

The Respondent and Cross-complainant offers to consent to the entering of an order by this court, at the same time when it rules on the demurrer to the Pleas in Abatement, authorizing the use in evidence on the trial of this cause, of all evidence, documentary and otherwise, produced or obtained by any party in cases No. 3010-63 and 3192-63 on the docket of the U. S. District Court for the Southern District of Alabama, to the same extent that the same would be admissible in evidence if obtained through discovery in this court, free of objection on the ground that the discovery through which such evidence was obtained was not had in this cause and in this court.

Movant respectfully shows unto the court that extensive discovery has been conducted in referenced causes in the U. S. District Court over a period of a number of years.

Respectfully submitted,

(Signed) DEWITT REAMS
Dewitt Reams
(Signed) JAMES D. BROOKS
James D. Brooks
Solicitors for Bart B. Chamberlain, Jr.
Respondent and Cross-Complainant

OF COUNSEL:
Pillans, Reams, Tappan, Wood & Roberts
510 Van Antwerp Bldg.
Mobile, Ala.

We, the undersigned, as counsel of record for the respective parties represented by us, hereby accept service of the above and foregoing motion and waive all further service and notice of the hearing of same.

(Signed) SAM W. PIPES III
Sam W. Pipes, III, counsel of record for complainants Howard M. Pack and Joseph Kahn

(Signed) JOSEPH M. MATRANGA
Joseph M. Matranga, counsel of record for Geo. H. Jett Drilling Co., Inc. and G. H. Jett

(Signed) C. A. L. JOHNSTONE, JR.
C. A. L. Johnstone, Jr., counsel of record for Four States Drilling Co., Inc., James E. Kemp and Kemp Oil Company.

APPENDIX D

SUMMARY OF TESTIMONY OF PACK, KAHN AND JETT PERTAINING TO THEIR PARTICIPATION IN THE LITIGATION

According to their own testimony neither Pack, Kahn nor Jett knew anything of or participated in the decision to intervene in the Jett-Chamberlain Action or to bring the Pack-Kahn Action in the state court.

Kahn had never communicated or corresponded with any member of the firm of Hamilton, Denniston, Butler and Riddick, the firm that filed the Pack-Kahn Action. (R. 421-2, 426.) Kahn had no specific recollection of any conversation with Chamberlain with respect to Kahn "becoming a party to a lawsuit." (R. 426.) Kahn found that he had become a party to a lawsuit from Chamberlain, but Kahn has no recollection when Chamberlain told Kahn. (R. 426.) Neither Zink, Smyth nor Sterling Oil has ever made any claim upon Kahn for money or against any property of Pack or Kahn. (R. 427-8.) If Kahn has read the complaint in the Pack-Kahn Action, Kahn read it "very superficially." (R. 428.) Kahn did not know whether the allegations in the Pack-Kahn complaint were true. (R. 428.) Kahn assumed the facts were correct because Pack and Kahn are "represented by good counsel" and Kahn has "faith in Mr. Chamberlain". (R. 428.) Kahn "assumed" Pack and Kahn had a dispute with Sterling Oil and its trustees based on "whatever" Chamberlain told him. (R. 426-7.)

Pack could not recall employing any lawyers to represent him in the Jett-Chamberlain Action. (R. 432). Pack was not familiar with the fact that he, Pack, had attempted to intervene in the Jett-Chamberlain action. (R. 432.) Pack stated that he would have to check his file to determine if some lawyer purported to act in his behalf in connection with the Jett-Chamberlain Action. (R. 433.) Pack would have to check with his attorney to determine whether he, Pack, attempted to intervene in the Jett-Chamberlain action. (R. 433.) Pack did know that Riddick represented Pack and Kahn in a "matter". (R. 434.) Chamberlain had arranged for Riddick's employment. (R. 434.) Pack did not "know anything at all about why Mr. Riddick stopped representing" Pack. (R. 437.) Pack did not recall any communication from any member of the Arendall firm. (R. 438.) Pack had not discussed the cases which he had pending with Arendall. (R. 439.) Pack had no memory of when he learned a suit had been filed in his name against Sterling Oil. (R. 444.) Pack did not know who Pack had sued in the Pack-Kahn action, Pack did not "read the complaint." (R. 477.) Pack acknowledged that he and Kahn "had no direct disputes with Sterling." (R. 448.) Pack assumed that Chamberlain had "a direct dispute with Sterling" and that what Pack and Kahn "were doing would be helping Mr. Chamberlain." (R. 448-9.) Pack had no knowledge of any claim by Zink, Smyth or Sterling Oil against Pack or Kahn or any property owned by Pack or Kahn. (R. 449-450.) Pack acknowledged that insofar as he was concerned that taking the case out of the jurisdiction of the federal court and putting it into the state court would have been a satisfactory reason for filing the suit if it would accomplish a pur-

pose. (R. 451-2.) Pack testified that whatever is alleged in the Pack-Kahn action came from Chamberlain. (R. 62.)

Jett discussed the filing of the Jett-Chamberlain Action with Chamberlain; Jett authorized Chamberlain to handle the legal aspects of the lawsuit; Chamberlain rather than Jett "actually contacted the lawyers"; and, Jett did not recall discussing the Jett Chamberlain Action with his attorneys. (R. 412-3.) Jett is and has been the owner of all of the outstanding capital stock of Geo. Jett Drilling. (R. 413, 416.) Jett did not know Geo. Jett Drilling had attempted to intervene in the Jett-Chamberlain Action. (R. 413.) To Jett's knowledge, Geo. Jett Drilling had never had any dispute with Zink, Smyth or Sterling. (R. 417, 418.) Jett knew of no property owned by Geo. Jett Drilling in which Sterling Oil claimed an interest. (R. 417.) Neither Zink, Smyth nor Sterling has ever made any claim against Geo. Jett Drilling. (R. 417.) Jett had never met with Pack or Kahn or with any attorney to discuss the filing of any lawsuit by Pack, Kahn and Geo. Jett Drilling. (R. 419.) Jett did not know whether he authorized Chamberlain to file any lawsuits in the name of Geo. Jett Drilling and if he had, Jett did not know who any such suit would have been filed against. (R. 420.)

Chamberlain and Corcoran met with members of the firm of Hamilton, Denniston, Butler & Riddick in connection with the Jett-Chamberlain Action and the Pack-Kahn Action. (R. 281.) The proposed complaint in the Pack-Kahn Action originally included Cornwall,

Equity and Ivanevic as parties plaintiff but had to be revised when Cornwall, Equity and Ivanevic refused to join as parties plaintiff. (R. 282.) After the Pack-Kahn Action was filed, the Hamilton firm assisted the Pillans firm is preparing answers in the Pack-Kahn Action for Cornwall, Equity and Ivanevic. (R. 282.) The Hamilton firm billed:

Mr. Bart B. Chamberlain, Jr.
Citronelle-Mobile Gathering System
Company, Ltd.
P.O. Box 1607
Mobile, Alabama

for its work in preparing the Jett-Chamberlain complaint, the petitions to intervene of Pack, Kahn and Geo. Jett Drilling, the Pack-Kahn complaint and the revision thereof and for assisting Cornwall, Equity and Ivanevic in preparing their answer to the Pack-Kahn complaint. (R. 281-283.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-22

STERLING OIL OF OKLAHOMA, INC., et al.,
Petitioners,

versus

BART B. CHAMBERLAIN, JR., et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF

Of Bart B. Chamberlain, Jr., Respondent

PRELIMINARY STATEMENT

This brief is filed in response to the Petition for Writ of Certiorari filed in this cause by Petitioners Sterling Oil of Oklahoma, Inc. ("Sterling") and its individual trustees, W. H. James, Jr. and Herbert C. Smyth. The underlying questions presented by this petition are not of recent vintage, and have been asserted in various forms by Petitioners from time to time during the course of this litigation, having been most recently considered by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in **Jett v. Zink**, 474 F.2d 149 (5th Cir. 1972), from which

decision this petition is prosecuted. We have consequently appended to this brief as Appendix "A" and Appendix "B", respectively, the appellee's brief and the supplemental brief filed in that appeal by Respondent Bart B. Chamberlain, Jr. ("Chamberlain"), which we hereby adopt and incorporate herein as Chamberlain's response to the instant petition. The Statement of the Case that follows merely highlights the facts set forth in the appendices, and is not intended to constitute our full response to the petition; rather, it is intended to place in proper focus this most recent attempt by Petitioners to frustrate the judicial determination by a state court of the merits of this litigation.

STATEMENT OF THE CASE

The filing of this petition is yet another attempt by Petitioners to utilize the federal courts to frustrate and, if possible, to nullify any judicial determination by the state courts of Alabama of a controversy between Petitioners and Respondents arising out of a document which has come to be known as the "Sterling Agreement", which document purports to affect certain interests in the Citronelle Oil Field located near Mobile, Alabama, and an oil pipeline and gathering system operated in connection therewith.

The litigation was commenced in 1963, and it was not until 1971 that the merits of the controversy were disposed of by trial in the Circuit Court of Mobile County, Alabama ("State Court"), resulting in a final decree holding the Sterling Agreement invalid and awarding Petitioners $500,175.00 in money damages. The trial was conducted at considerable expense to the parties, required approximately 33 court calendar days over a four month period of time, and effectively consumed the time of eleven lawyers. Over 1000 exhibits were introduced and the record on appeal exceeds 8000 pages. The judgment was appealed by Petitioners and the cause has been argued and is even now under

submission in the Supreme Court of Alabama. A decision is expected by early fall which should finally dispose of the controversy.

In spite of the present appeal pending in the Alabama Supreme Court, Petitioners are obviously desirous of undoing all that has been accomplished by the state and federal courts in the disposition of this "convoluted" litigation, for Petitioners would now have this Court (1) ignore the doctrine of *res judicata* and require a duplication of the trial on the merits in a federal court, and (2) hold for naught the decision of State Court not only on the merits but also on the question of concurrent state court jurisdiction, which decision is even now pending before the Supreme Court of Alabama.

We submit that this petition is merely another attempt by Sterling to bring about needless friction between the federal court system and the state court system similar to previous attempts which have been detailed in our Fifth Circuit briefs appended hereto, and which we will briefly highlight for the Court's convenience.

Petitioners' attempts to prevent the trial of the controversy in State Court have resulted in five appeals to the Fifth Circuit, four of which have been reported and are found at **Jett v. Zink**, 362 F.2d 723 (5th Cir. 1966) **cert. denied**, 385 U.S. 987 (1966), hereinafter called the "First Jett v. Zink Appeal"; and **Jett v. Zink**, 474 F.2d 149 (5th Cir. 1973), hereinafter called the "Second Jett v. Zink Appeal". The questions raised on all of these appeals were limited to the issue of the jurisdiction of the State Court over the controversy.

The litigation between the parties consists of three lawsuits, *viz*: The Jett-Chamberlain Action; the Pack-Kahn Action; and the Sterling Action. The Jett-Chamberlain Action was filed in State Court on March 23, 1963, but was removed by Sterling to the United States District Court

for the Southern District of Alabama ("District Court") on the ground of federal diversity jurisdiction. The only parties to the action were Jett and Chamberlain as plaintiffs, and Sterling and its individual trustees as defendants, and diversity existed on the face of the pleadings.

After removal, motions were filed for leave to joint Pack, Kahn and others as indispensable parties, and while these motions were under submission, the Pack-Kahn Action was filed in State Court on July 3, 1963, joining all parties in interest. This cause was also removed by Sterling, even though there did not exist the requisite diversity of citizenship. In an effort to circumvent this obstacle, Sterling asserted that all parties whose presence would destroy diversity jurisdiction were merely "nominal parties", and/or were "fraudulently joined" by Jett and Chamberlain, and/or the issues between Jett and Chamberlain on the one hand and Sterling on the other constituted a "separate controversy."

On November 22, 1963, Sterling filed the Sterling Action in District Court, naming only Jett and Chamberlain as defendants, jurisdiction being based solely upon diversity of citizenship.

From the very beginning, the issues in all three causes were substantially the same, the only material difference being that the Pack-Kahn Action alone joined all of the parties to the controversy, and that case was therefore the only case in which a final decree would settle **all** of the issues between **all** of the parties. Nevertheless, Sterling, for reasons best known only to it, has consistently sought to have the controversy tried piecemeal. Indeed, Sterling has attempted to prevent Respondents Howard M. Pack ("Pack") and Joseph Kahn ("Kahn") from litigating about their rights in any forum, for having successfully resisted their joinder in the Jett-Chamberlain Action (thereby leaving Pack and Kahn to litigate in State Court),

Sterling is now attempting to hold for naught the final decree of State Court, after having unsuccessfully sought to prevent the trial itself.

In the First Jett v. Zink Appeal, the Fifth Circuit held that Pack, Kahn and the other parties who sought to join in the Jett-Chamberlain Action were not indispensable, and therefore sustained federal removal jurisdiction of that case; but as to the Pack-Kahn Action, the court held (1) that Pack and Kahn were not nominal parties and that they had stated a cause of action, (2) that there was no "fraudulent joinder" and (3) that there was no separable controversy; hence, the Pack-Kahn Action had been improperly removed, and it was ordered remanded to State Court.

After unsuccessful efforts by Sterling to stay or recall the mandate, the Pack-Kahn Action was eventually returned to State Court in January of 1967. However, it did not long remain there, for when Chamberlain filed a cross-bill of complaint in June, 1967, Sterling again removed the Pack-Kahn Action, asserting this time as grounds for removal that there existed a "conspiracy" to prevent Sterling from litigating in the federal courts about its asserted rights under the Sterling Agreement. It was not until March, 1968, that District Court again remanded the Pack-Kahn Action to State Court.

Shortly after the second remand of the Pack-Kahn Action, Sterling filed pleas in abatement in State Court, seeking to abate that action in favor of the Jett-Chamberlain Action, on the theory, *inter alia,* that Pack and Kahn were the "alter-ego" of Jett and Chamberlain. These pleas were held to be insufficient by State Court.

In February, 1971, during proceedings in a related case, District Court of its own motion announced an intention to try the Jett-Chamberlain Action in the summer of 1971, even though at that time issue had not been joined on all of the questions involved in the lawsuit, nor had the more

important question of the joinder of all of the parties been settled, despite the fact that these questions had been pending before the court for almost three years. It was not until May 3, 1971 (the day before the Pack-Kahn Action went to trial), that District Court entered an order setting the Jett-Chamberlain Action for trial on July 12, 1971.

Upon the "announcement" of the District Court, Respondents had set proceedings in motion to get the Pack-Kahn Action to trial as quickly as possible, and on March 8, 1971, State Court entered an order setting that case for trial on May 4, 1971, without hearing oral argument from counsel for any party. On March 26, 1971, Sterling moved State Court to continue the Pack-Kahn Action. After hearing oral argument, this motion was denied.

Having failed to obtain a delay of the trial in State Court, Sterling then on April 15, 1971, filed in District Court a Motion for Preliminary Injunction and a Petition for Preliminary and Permanent Injunction, seeking to enjoin Respondents and their attorneys from in any manner prosecuting the Pack-Kahn Action in State Court, asserting for the first time the theory that the prosecution of the Pack-Kahn Action would deprive District Court "of its first acquired jurisdiction" and would prevent District Court "from enforcing Sterling's equitable interest as a lien" on properties involved in the litigation.

When District Court denied Sterling's Motion for Preliminary Injunction on April 20, 1971, Sterling filed a notice of appeal from that order and on the same day filed in the Fifth Circuit a motion for an injunction pending appeal, requesting an emergency hearing. This motion was heard on Saturday, May 1, 1971, before the Honorable Joe Ingraham, Circuit Judge, in chambers at Houston, Texas, and on that date he denied Sterling's motion. The Fifth Circuit subsequently denied Sterling's motion for reconsideration, and this appeal was later dismissed by order of court because of Sterling's failure to prosecute same.

At the same time that Sterling was attempting to get the Fifth Circuit to enjoin the Pack-Kahn Action, it was also seeking an order from the Alabama Supreme Court prohibiting State Court from proceeding with the trial of that case. A hearing was had before the Alabama Supreme Court in chambers, and on May 3, 1971, this request was denied.

The trial of the first phase of the Pack-Kahn Action commenced on May 4, 1971, and continued for approximately six weeks. On July 10, 1971, the Saturday before the Monday on which the Jett-Chamberlain Action was set for trial in District Court, State Court entered an interlocutory decree finding the Sterling Agreement to be valid, but reserving for future determination questions concerning the meaning and enforceability of specific provisions of the agreement.

In view of the fact that this interlocutory decree quite obviously did not terminate the proceedings in State Court as Respondents had hoped it would, they promptly filed in District Court a motion to stay the trial of the Jett-Chamberlain Action, supported by an affidavit showing in detail the facts upon which Respondents relied as grounds for granting the requested stay, viz: the parties were then in the midst of the trial of the Pack-Kahn Action; State Court, after approximately six weeks of trial conducted at great expense to the parties, had disposed of substantial issues pending between the parties; State Court had determined to resume the trial of the Pack-Kahn Action at an early date and intended to dispose of the remaining issues within a short time thereafter; and a final decree in the Pack-Kahn Action would (and did in fact) dispose of all of the issues presented in the Jett-Chamberlain Action.

Sterling filed no response to this motion and affidavit.

District Court on July 14, 1971, granted the motion to stay and on the same day Sterling then requested District

Court to rule on its Petition for Temporary and Permanent Injunction which had been filed the previous April. District Court denied this petition, and Sterling filed a notice of appeal from such denial. Many months later, Sterling filed an "amended" notice of appeal to include the order of July 14 staying further proceedings in the Jett-Chamberlain Action.

In the meantime, the trial of the Pack-Kahn Action proceeded to conclusion in State Court, and in November a final decree was entered withdrawing the interlocutory decree of July 10, 1971, holding the Sterling Agreement to be invalid and unenforceable, but awarding Sterling as a finder's fee and as compensation damages in the amount of $500,175.00.*

Respondents then filed a motion for summary judgment in District Court, and in January, 1972, their motion was granted and the Jett-Chamberlain Action and Sterling Action were dismissed on grounds of *res judicata*. Sterling appealed from this order, and this appeal is known as the Second Jett v. Zink Appeal. During the course of this appeal, Sterling has sought unsuccessfully to enjoin any further proceedings in the Pack-Kahn Action.

On May 29, 1972, the last day for the taking of an appeal of the Pack-Kahn Action, Sterling filed notice of appeal

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* At this point it is significant to note that in its unsuccessful attempt to uphold the first removal of the Pack-Kahn Action, Sterling filed a "disclaimer" in Fifth Circuit, in which it "disclaimed" any cause of action against Pack, Kahn and Cornwall Trading Corporation (another party whose joinder would have destroyed diversity jurisdiction). At the conclusion of the trial of the Pack-Kahn Action, Sterling "withdrew" this "disclaimer" and the State Court in its final decree apportioned against these parties $143,800.31 of the $500,175.00 which it awarded Sterling. Sterling is seeking to uphold this judgment in its appeal in the Alabama Supreme Court, while at the same time taking the contradictory position before this Court that the filing, prosecution and trial of the Pack-Kahn Action was done in "bad faith" to cause "needless friction" between state and federal courts, and would have this Court cause the said final decree to become a nullity.

in the Supreme Court of Alabama and after innumerable delays, finally perfected said appeal on February 15, 1973. Briefs have been filed in that appeal, and oral argument was had before the Supreme Court of Alabama in June of this year. The case is now under submission. A decision is expected in the fall of 1973.

REASONS FOR GRANTING THE WRIT

In summary, after the 1966 decision in the First Jett v. Zink Appeal, there were three *in personam* lawsuits concerning the controversy: the Jett-Chamberlain Action and the Sterling Action were pending in District Court but contained only some of the parties; and the Pack-Kahn Action was pending in State Court and encompassed not only all of the issues to the controversy but also joined all of the parties in interest.

Not only did the Fifth Circuit in the First Jett v. Zink Appeal recognize that its decision, which left the litigation in this posture, signaled a "race to the courthouse", but Sterling also well knew and fully appreciated the consequences of that decision, for within a few months thereafter it filed a motion seeking to recall the mandate and argued that:

> "If the remand order of this Court stands, the result is not only 'unfortunate in that it leaves the same issues pending simultaneously in a state and federal court', **but Sterling Oil is faced with trying the same issues with Jett and Chamberlain in both federal and state courts or abandoning its right to try its dispute with Jett and Chamberlain in the federal court**" [emphasis added].

Therefore, Sterling was fully cognizant of the "rules for the race" and it also knows that this Court long ago formulated same in **Kline v. Burke Construction Co.**, 260

U.S. 226 (1922), which held that where state and federal courts have concurrent jurisdiction of a controversy, neither court may prevent either party from simultaneously pursuing claims in both courts, and that each court may proceed until a final decree in one court may be pleaded *res judicata* to proceedings in the other.

Although armed with the knowledge of the "rules for the race", Sterling nevertheless directed its attention to unsuccessful attempts to prevent the trial of the Pack-Kahn Action in State Court, instead of taking affirmative measures to move the Jett-Chamberlain Action to trial in federal court. It is an indisputable fact that Sterling at no time requested District Court to set the Jett-Chamberlain Action for Trial, and it is clear that cause was set for trial by District Court *ex mero motu*.

Having lost the race to the courthouse, Sterling has contrived to cast its petition in such a fashion as to now ask this Court to ignore and undo all that has been accomplished by the federal and state courts in disposing of the issues relating to jurisdiction and the issues going to the merits of this controversy, and would apparently have this Court place the parties back at their starting positions of 1963.

Sterling asserts as reasons for granting the writ that the Fifth Circuit's reliance on Title 28 U.S.C. Sec. 2283 (the "anti-injunction statute") "appears" to be in direct conflict with **French v. Hay**, 22 Wall 250 (1873) and **Mitchum v. Foster**, 407 U.S. 225 (1972). However, it is clear from the opinion itself that the Fifth Circuit did in fact consider this principle and found, as was quite obvious, that the Pack-Kahn Action was not the same action as the removed Jett-Chamberlain Action, since (1) there were additional parties in the Pack-Kahn Action who had stated legal causes of action which they had a right to have adjudicated, and (2) Chamberlain had been given authority

to act for these additional parties and he was "justified in bringing a suit in their names to protect their interests".

Mitchum v. Foster, *supra*, has nothing whatsoever to do with the application of the anti-injunction statute to a removed action.

The failure of the Fifth Circuit to review the interlocutory order of District Court staying further proceedings in the Jett-Chamberlain Action is hardly a "drastic departure from the accepted and usual procedure of reviewing all interlocutory orders on an appeal from a final judgment" as asserted by Petitioners, since at the time the Fifth Circuit was called upon by Sterling to review the propriety of the stay order, it had become moot by reason of the final decree entered in the Pack-Kahn Action.

Moreover, and contrary to the assertion by Sterling that the granting of the motion to stay the Jett-Chamberlain Action was an "abdication" of federal jurisdiction, the facts presented to District Court and contained in the motion and attached affidavit (which Sterling has failed to refer to but which is found in the printed appendix of the record on appeal at pages 304-322) furnished a more than adequate basis for District Court to exercise its sound discretion in ordering the stay. In **Landis v. North American Company**, 299 U.S. 248, 254-255 (1936), this Court held that:

> ". . . [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance [citations omitted]."

The granting of the stay by District Court is not in conflict, direct or otherwise, with **Meredith v. City of Winter**

Haven, 320 U.S. 228 (1943), for **Meredith** held that it is error for a federal court to **decline** federal diversity jurisdiction on the grounds that the case involves difficult questions of state law. That case dealt with the "abstention doctrine", and the district court there was not called upon to exercise its discretion in determining whether to stay a federal action in favor of a concurrently proceeding state court action in the interest of the efficient administration of justice.

Sterling states in this petition that District Court granted the stay "because after the setting of the trial date of the federal action 'Chamberlain secured an earlier trial setting in the state court and began the taking of testimony'," and cites certain pages of the appendix to its petition containing remarks made in chambers by the district judge. This statement is indeed interesting, since Sterling asserted in brief to the Fifth Circuit that the District Court had a different reason for granting the stay, arguing that it was "apparently" based upon the estimated completion date of the trial of the Pack-Kahn Action, again citing certain portions of the district judge's remarks in chambers. Aside from being contradictory, both statements are rank speculation and completely ignore the facts as set forth in the record. The continuance of the Jett-Chamberlain Action was granted by District Court in response to the aforesaid motion for stay and the facts set forth in the affidavit attached thereto.

Sterling also argues that the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983) "appears" to entitle federal litigants to protection from subsequently filed state actions, citing **Mitchum v. Foster,** *supra.* The advancing of this proposition at this stage of the litigation is utterly frivolous. There is no resemblance whatsoever between **Mitchum** and the instant case. In **Mitchum,** this Court held that the Civil Rights Act of 1871 constitutes an express statutory authorization under the "Acts of Congress exception" of

the anti-injunction statute, and therefore any party proceeding under such Act could on an appropriate showing be entitled to an injunction against state proceedings. We do not understand that Sterling is proceeding under 42 U.S.C. Sec. 1983, and this is the first mention of the Act in this case. In all events Petitioners failed to raise this point in District Court or in Fifth Circuit.

Sterling also "submits" that Chamberlain has acted in "bad faith" in depriving Sterling of a federal forum, and has also created "needless friction" between state and federal courts, apparently relying upon the off-hand comments made by the district judge in chambers, only some of which however are reproduced in Appendix "B" to Sterling's petition. The quotations as set forth in the appendix clearly show that not only was District Court remonstrating with all parties concerning the maneuvering during the "race to the courthouse", but District Court also made it quite clear that it was on its initiative that the litigation began to move towards conclusion (Appendix "B" of petition, page 36a); and the court accused Sterling of trying to extend the trial of the Pack-Kahn Action so as to bring it into collision with the trial setting of the Jett-Chamberlain Action (Appendix "B" of the petition, page 40a).

In point of fact, it is Sterling who has caused the friction between State Court and District Court by attempting to circumvent on various contrived theories the clear prohibition of the anti-injunction statute, instead of taking early, affirmative measures to get the Jett-Chamberlain Action to trial.

Finally, Sterling argues that the Fifth Circuit committed error in holding that Sterling is estopped from asserting in 1971 that the litigation is *quasi in rem*, in view of the fact that in 1963 it insisted that the litigation was *in personam*. Sterling states that the doctrine of estoppel has no application in determining whether or not a court in fact has

jurisdiction readily shows that it was confirming its prior holding that the litigation is *in personam*, and that in any event Sterling is now estopped from asserting otherwise. However, assuming *arguendo* that Sterling is not estopped from so arguing, and that the litigation is in fact *quasi in rem*, this would avail Sterling nothing because in that event it is clear that Pack, Kahn and the other additional parties would become indispensable and federal diversity jurisdiction would thereby be destroyed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated at Mobile, Alabama this 24th day of July, 1973.

Respectfully submitted

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Bart B. Chamberlain, Jr.

Of Counsel:

HAND, ARENDALL, BEDSOLE,
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Certificate of Service

I, Harold D. Parkman, the attorney for Bart B. Chamberlain, Jr., one of the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that on the 24th day of July, 1973, I served copies of the foregoing Brief on the several parties hereto by

mailing copies in duly addressed envelopes, with first class postage prepaid to their respective attorneys of record as follows:

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.....
HAROLD D. PARKMAN

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2745

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Appellees,

versus

ALBERT BARNES ZINK, as Individual Trustee for
Sterling Oil of Oklahoma, Inc.,
Defendant,

STERLING OIL OF OKLAHOMA, INC., et al.,
Defendants-Appellants.

No. 72-1637

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Appellees,

versus

ALBERT BARNES ZINK, as Individual Trustee for
Sterling Oil of Oklahoma, Inc.,
Defendant,

W. H. JAMES, JR., Etc., et al.,
Defendant-Appellant,

HOWARD M. PACK, et al.,
Third Party Defendants-Appellees.

STERLING OIL OF OKLAHOMA, INC., et al.,
Plaintiffs-Appellants,

versus

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Defendants-Appellees,

HOWARD M. PACK, et al.,
Third Party Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

CERTIFICATE REQUIRED BY FIFTH CIRCUIT LOCAL RULE 13(a):

The undersigned, counsel of record for Bart B. Chamberlain, Jr., certifies that the following listed parties have an interest in the outcome of this case. These representa-

tions are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a):

1. Bart B. Chamberlain, Jr.
2. G. H. Jett
3. Howard M. Pack
4. Joseph Kahn
5. Sterling Oil of Oklahoma, Inc.
6. Cornwall Trading Corporation
7. The Equity Corporation
8. James E. Kemp
9. Kemp Oil Co.
10. Big Four Oil Co., Inc.
11. Four States Drilling Co., Inc.
12. Geo. H. Jett Drilling Co., Inc.
13. Herbert C. Smyth, as Trustee for Sterling Oil of Oklahoma, Inc.
14. Albert Barnes Zink, as Trustee for Sterling Oil of Oklahoma, Inc.
15. W. H. James, Jr., as Trustee for Sterling Oil of Oklahoma, Inc.
16. Citronelle Properties, Inc.
17. Citronelle-Mobile Gathering System Company, Ltd.
18. Citronelle Gathering, Inc.
19. Whellabrator-Frye

HAROLD D. PARKMAN
Attorney of record for
Bart B. Chamberlain, Jr.

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Defendant-Appellant,

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Third Party Defendants-Appellees.

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Defendants-Appellees,

HOWARD M. PACK, et al.,
Third Party Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

BRIEF OF BART B. CHAMBERLAIN, JR., APPELLEE

PRELIMINARY STATEMENT

This brief is submitted on behalf of Bart B. Chamberlain Jr., one of the appellees in Appeals No. 71-2745 and No. 72-1673, and is being filed as a consolidated brief in

both appeals, pursuant to permission of this Court previously given.

Because appellants have elected to defer the printing of the appendix in accordance with Rule 30(c) FRAP, the page references to the appendix of necessity have been left blank, but additional copies of the brief will be filed with the Court after the appendix has been printed, with the page references apropriately inserted, all as provided in Rule 30(c). Since portions of the record in this cause have been previously separated and numbered independently of the entire record, it has been impossible to refer in this copy of the brief to the actual pages of the record, as contemplated by Rule 30(c).

Additionally, appellants in their brief have implicitly advanced the proposition that they were not accorded a full hearing on the question of the setting of a companion case for trial in the state court of Alabama. Since they have drawn that issue into these appeals, we deem it necessary to present to this Court pertinent portions of the record of the proceedings in the state court so that the facts relating to that issue will be apparent from the record itself. Accordingly, we have attached as an appendix to this brief copies of the orders of state court relating to the setting of that case for trial, and these documents are designated as lettered appendices to this brief.

STATEMENT OF ISSUES

A. **Is a Party Prohibited, by Virtue of (1) *Res Judicata*, (2) the Law of the Case, and (3) Preclusion Against Inconsistent Positions, From Re-Litigating the Question of Concurrent Jurisdiction of a Federal Court and a State Court Over a Controversy, Where Such Question Has Been Previously Determined in the Same Cause Among the Same Parties by an Appellate Court?**

B. **Is an Action for Declaratory Judgment Requesting a Judicial Determination of the Respective Rights of Parties to a Written Contract and an Accounting Among Them an Action *In Personam* Where the Contract Purportedly Imposes Personal Obligations on One of the Parties (1) to Assign to the Other Party Overriding Royalties in Mineral Leases, and (2) to Pay to the Other Party Certain Monies Out of the Income From an Oil Pipeline?**

C. **Did the Federal District Court Err in Refusing to Enjoin Parties From Proceeding With the Trial of a Concurrent Action Pending in a State Court, Where a Federal Appellate Court Had Previously Determined in the Same Cause That the State Court Had Jurisdiction of the Concurrent Action Sought to Be Enjoined?**

D. **Did the Federal District Court Abuse Its Discretion in Ordering a Continuance of the Trial of a Case Pending on Its Docket When a Companion Case Involving the Same Parties and Subject Matter Was Then Being Actively Tried in State Court, and the Trial of the Case in Federal Court Would Be (1) Duplicative of the Issues Being Tried in the State Court, (2) Expensive and Burdensome to the Litigants and the Court, and (3) the Conclusion of the State Court Trial Would Judicially Dispose of the Issues Pending in the Cause in the Federal District Court?**

E. Where Two Concurrent Actions Are Pending in a Federal Court and in a State Court Involving the Same Subject Matter and the Same Parties, Is a Final Judgment Rendered in the State Court *Res Judicata* and a Bar to Further Proceedings in the Federal Court?

STATEMENT OF FACTS

The question presented on these appeals involves the effect and conclusiveness of a decision of this Court rendered on June 23, 1966, in **Jett v. Zink**, 362 F.2d 723 (1966), *cert. denied* 385 U.S. 987 (1966), when this same litigation was on appeal to this Court seeking a determination of the proper forum in which to try two lawsuits hereinafter referred to as the "Pack-Kahn Action" and the "Jett-Chamberlain Action." This Court held that state court and federal court have concurrent jurisdiction, and that the proper forum for the Pack-Kahn Action is the state court, and the proper forum for the Jett-Chamberlain Action is the federal court.

The Jett-Chamberlain Action was commenced on March 26, 1963, with the filing by Bart B. Chamberlain, Jr. (Chamberlain) and George H. Jett (Jett) of a bill for declaratory judgment in the Circuit Court of Mobile County, Alabama ("State Court"). The parties respondent were Sterling Oil of Oklahoma, Inc. and its individual trustees, Albert Barnes Zink and Herbert C. Smyth (hereinafter sometimes collectively referred to as "Sterling"). The bill sought a declaratory judgment as to the validity, and if valid, the meaning, of a contract which has been referred to as the Sterling Agreement. Specifically, Jett and Chamberlain prayed that the Sterling Agreement be declared null and void for the reason that Sterling was not qualified as a foreign corporation to do business in Alabama when the agreement was entered into, and as alternative relief, they asked for a construction of the Sterling Agreement favorable to their interests (**Jett v. Zink**, p. 728). Stated concisely, the Sterling Agreement provided that, after the happening of certain events, Jett and Chamberlain were to assign overriding royalties to Sterling out of their ownership of working interests in

certain mineral leases, and further, to pay to Sterling's trustees a specified percentage of receipts accruing on account of the operation of an oil pipeline referred to as the "gathering system." The parties signatory to the Sterling Agreement were Jett and Chamberlain on the one hand, and Sterling and its trustees on the other.

The Jett-Chamberlain Action was removed by Sterling to the United States District Court for the Southern District of Alabama, Southern Division ("District Court"), alleging that federal jurisdiction existed by virtue of diversity of citizenship of the parties. This action was designated on the docket of the Clerk of the District Court as Civil Action No. 3010-63. At this juncture, Howard M. Pack (Pack), Joseph Kahn (Kahn) and Geo. H. Jett Drilling Co. (Jett Drilling) moved for leave to intervene is indispensable parties plaintiff in the Jett-Chamberlain Action, and Chamberlain moved for an order making Cornwall Trading Corporation (Cornwall) and Four-States Drilling Company, Inc. (Four-States) involuntary parties plaintiff. At the same time, Jett and Chamberlain moved to remand the case to State Court on the ground that the addition of these parties to the litigation would destroy federal diversity jurisdiction (**Jett v. Zink**, p. 725). The pleadings alleged that these additional parties owned interests in the mineral leases out of which the overriding royalties were to be conveyed to Sterling. Pack, Kahn and Cornwall also owned interests in the gathering system (**Jett v. Zink**, pp. 727, 728).

While these motions to bring in additional parties were under submission, Pack, Kahn and Jett Drilling on July 3, 1963, filed the Pack-Kahn Action in State Court against Zink, Smyth, Sterling, Jett, Chamberlain, Cornwall, Four-States, The Equity Corporation (Equity), James E. Kemp (Kemp) and others not necessary to be mentioned here. Pack, Kahn and Jett Drilling were seeking the same re-

lief in this suit as the relief being sought in the Jett-Chamberlain Action (**Jett v. Zink**, p. 725). Although the Pack-Kahn Action was not removable on the face of the pleadings because complete diversity of citizenship did not appear (**Jett v. Zink**, p. 729), Sterling removed the action to District Court. In order to avoid this impediment to removal, Sterling alleged (1) that the only necessary parties in the Pack-Kahn Action were Jett and Chamberlain on the one hand, and Sterling and its trustees on the other (all other named parties being allegedly "nominal"), and (2) that a "separable controversy" existed between Sterling and Jett and Chamberlain (**Jett v. Zink**, p. 729). Pack, Kahn and Jett Drilling promptly moved to remand the Pack-Kahn Action to State Court.

In the meantime, Sterling filed its answer and counterclaim in the Jett-Chamberlain Action on May 1, 1963, generally denying the allegations of the complaint, and asserting that Jett and Chamberlain had breached the agreement by unnecessarily and unreasonably delaying the date of the accomplishment of the conditions upon which depended the assignment of the overriding royalties, by failing and refusing to make the payments from the gathering system, by failing and refusing to make annual accountings to Sterling and, in general, by failing and refusing to perform certain other obligations allegedly imposed upon Jett and Chamberlain under the agreement. Sterling thereupon demanded an accounting from Jett and Chamberlain, a judgment for the amount found to be due thereunder, and a declaration of the rights of Sterling in certain "Deep Rights" as that term is defined in the agreement (App. 88-94).

On November 22, 1963, while the motions to remand the Jett-Chamberlain Action and the Pack-Kahn Action were under submission, Sterling and its trustees filed in District Court a separate lawsuit against Jett and Cham-

berlain requesting the same relief as prayed for in their counterclaim in the Jett-Chamberlain Action (App. 636-680). This third action was docketed as No. 3192-63, and will be referred to as the "Sterling Action." On September 3, 1965, Sterling amended its complaint in the Sterling Action and prayed that Jett and Chamberlain be required to specifically perform the Sterling Agreement (App. 693-698).

On December 31, 1963, District Court denied the motions to remand in the Jett-Chamberlain Action and the Pack-Kahn Action and, pursuant to Title 28 U.S.C. § 1292(b), Jett and Chamberlain appealed the Jett-Chamberlain Action (Appeal No. 21,282), and Pack, Kahn and Jett Drilling appealed the Pack-Kahn Action (Appeal No. 21,283). These are the appeals which this Court heard in **Jett v. Zink.**

When the appeal of the Jett-Chamberlain Action was heard by this Court, Sterling argued that the alleged indispensable parties sought to be brought into that action were not necessary because the Sterling Agreement "was carefully drawn to make the obligations of Jett and Chamberlain **personal obligations** to Zink and Smyth and to prevent Sterling and its trustees from acquiring any interest in any real property in Mobile County, Alabama," [Emphasis added] (App. 588), and that the "**complaint sets forth a simple action for a declaratory judgment** between **all** the parties to a written contract to declare the contract null and void or in the alternative to construe the contract in a manner desired by Jett and Chamberlain." [Emphasis supplied) (App. 586). Sterling also argued that Jett and Chamberlain's obligations under the agreement were merely **personal obligations** to pay money to Sterling trustees and **personal obligations** to transfer interest in certain oil royalties (App. 588). Therefore, Sterling concluded that the interests of

Pack, Kahn and Cornwall were free and clear of any claim by Sterling (App. 594). This Court agreed with Sterling in these contentions and held that the cause of action alleged in the Jett-Chamberlain Action was not such as to make Pack, Kahn and Cornwall indispensable parties to **that** lawsuit, despite their ownership in the mineral leases and the gathering system. This Court therefore affirmed the decision of District Court in refusing to remand the Jett-Chamberlain Action (**Jett v. Zink**, p. 729).

With respect to the appeal of the Pack-Kahn Action, Sterling's position was that Jett, Chamberlain, Pack, Kahn and Jett Drilling had "attempted to deprive them of their federally created right to have the suit tried in a federal court by fraudulently and in bad faith joining other parties in order to defeat removal" (**Jett v. Zink**, p. 729). Their argument was based upon the fact that the Pack-Kahn Action was filed while the motions to bring in additional parties in the Jett-Chamberlain Action were under submission, and upon the fact that Jett, Chamberlain, Pack, Kahn and Jett Drilling were then all represented by the same counsel (**Jett v. Zink**, p. 729). Additionally, in an attempt to eliminate the interest which Pack, Kahn and Jett Drilling were asserting in the litigation, Sterling filed in this Court a few days before oral argument, a "disclaimer" in which they attempted to "disclaim any right of action" against these parties "arising out of the allegations of the pleadings" in the Pack-Kahn Action and the Jett-Chamberlain Action (App. 584). Sterling also claimed that there was a separate and independent claim or cause of action stated in the Pack-Kahn Action, entitling them to remove the case under the provisions of Title 28, U.S.C., § 1441(c).

In its decision of June 23, 1966, this Court held that District Court committed reversible error in refusing to

remand the Pack-Kahn Action. It disposed of Sterling's allegations of fraudulent joinder in the following language:

> "It is hornbook law that fraud is never presumed but must be established by clear and persuasive evidence. Moreover, there was good reason for bringing the second suit [Pack-Kahn Action] in order to assure the plaintiffs therein a day in court in the event that they were not admitted as parties plaintiff in the earlier suit, as indeed they were not. The question is whether they have stated a cause of action against any of the defendants whose presence in the litigation would destroy complete diversity of citizenship of the parties. We think they have" (**Jett v. Zink**, p. 730).

This Court held that Pack, Kahn, Jett Drilling and Cornwall "have an obvious interest in the validity of the Sterling Agreement and in an interpretation of it to their advantage" (**Jett v. Zink**, p. 730), and also held the "disclaimer" to be "of no moment," admonishing Sterling that "It is not for defendants to shape plaintiffs' cases. No doubt, most defendants would like to escape trial and possible liability by disclaiming any right of action against a plaintiff" (**Jett v. Zink**, p. 730). The Court also held that "There simply are not 'separate and independent claims or causes of action' alleged" (**Jett v. Zink**, p. 730).

This Court was fully cognizant of the fact that its decision left the Jett-Chamberlain Action pending in District Court and the Pack-Kahn Action pending in State Court, for it concluded its opinion with the following statement:

> "The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court, but we see no escape from our conclusion. The

parties here brought it upon themselves in their battle over the forum in which to try their case" (**Jett v. Zink**, p. 730).

After petitions for rehearing of each appeal were denied by this Court, Jett and Chamberlain filed a petition for writ of certiorari to the Supreme Court in the Jett-Chamberlain Action, and Sterling filed a petition for writ of certiorari to the Supreme Court in the Pack-Kahn Action. Both petitions were denied (**Jett v. Zink**, 385 U.S. 987 (1966)).

However, before the Pack-Kahn Action was remanded to State Court, Sterling filed in this Court a motion to Recall the Mandate and Direct Further Proceedings in District Court, asserting that it had taken the deposition of G. H. Jett on September 13, 1966, and had elicited testimony which it alleged constituted a "sufficient preliminary showing" which would justify such an order. In their brief filed in this Court in support of their motion, they argued:

"If the remand order of this Court stands, the result is not only 'unfortunate in that it leaves the same issues pending simultaneously in a state and federal court', **but Sterling Oil is faced with trying the same issues with Jett and Chamberlain in both federal and state courts or abandoning its right to try its dispute with Jett and Chamberlain in the federal court**" [emphasis added] (App. 611).

This Court denied Sterling's motion to recall the mandate.

On November 3, 1966, and November 15, 1966, District Court entered an Order and Supplemental Order, respectively, holding that:

"[A]lthough the Sterling agreement related back to and became effective as of May 1, 1959, it was not

actually made and delivered until after Sterling qualified to do business in the State of Alabama on August 6, 1959, and, therefore, the Sterling Agreement was not rendered invalid by virtue of failure on Sterling's part to qualify to do business in Alabama prior to the date on which it did so qualify. . . ."

* * * * * * * *

"Notwithstanding the provisions of said Order, the Court reserves for future determinations all controversies between the parties hereto with respect to the meaning and enforceability *vel non* of specific provisions of the Sterling Agreement." (App. 128-133).

On June 8, 1967, after the Pack-Kahn Action had been remanded to State Court, Chamberlain filed an answer to the complaint and filed therewith his cross-bill of complaint against Sterling, Smyth, Zink and the other respondents in the Pack-Kahn Action. This answer and cross-bill was supplementary to the original answer and cross-bill filed by Jett and Chamberlain on January 23, 1964 (App. 514-552).

In the cross-bill of complaint, Chamberlain was seeking a declaration that the Sterling Agreement is invalid, or if it be valid, he was seeking a determination of same favorable to his interests. In addition to the defenses asserted by Pack and Kahn as to the invalidity of the Sterling Agreement (and in addition to the grounds then asserted by Chamberlain and Jett in the Jett-Chamberlain Action), Chamberlain contended that the Sterling Agreement is also void and unenforceable by reason of economic duress and business compulsion practiced upon him by Sterling, its officers and trustees (App. 547-548). Sterling used the occasion of the filing of this cross-bill to again remove the Pack-Kahn Action to District Court, asserting this time as grounds for removal that there existed a "conspiracy" to prevent Sterling from litigat-

ing in the federal courts about its asserted rights under the Sterling Agreement. After protracted oral argument and the filing of extensive briefs, District Court held that this second removal was also improper and thereupon entered an order again remanding the Pack-Kahn Action to State Court on March 15, 1968 (App. 378).

On April 17, 1968, Chamberlain and Jett amended their complaint in the Jett-Chamberlain Action to assert the grounds of economic duress and business compulsion as a defense to the validity of the Sterling Agreement, and amended their answer to the counter-claim filed by Sterling in that case to assert the same additional defense (App. 160-164). On May 21, 1968, Sterling filed a motion to strike the amended complaint and amended answer to counter-claim, asserting that the defenses of economic duress and business compulsion were precluded by the "partial summary judgment" rendered by District Court on November 3 and 15, 1966 (App. 167-168). These motions were not heard and no order was entered thereon until March 11, 1971. Except for sporadic discovery activity by the parties in the Jett-Chamberlain Action, both actions lay practically inactive on the dockets of District Court and State Court until 1971.

In February of 1971, during a hearing on motions pending in related litigation, District Court (acting through the Honorable Virgil Pittman) announced to counsel that he had decided of his own motion to set the Jett-Chamberlain Action for trial the following July (App. 374, 379). At that time motions were pending to add parties and strike amendments to pleadings (Certified docket entries). On February 12, 1971, Judge Pittman issued a preliminary pre-trial order requiring the parties to prepare a joint statement of the issues and uncontested facts, and setting pre-trial for March 1, 1971, which was subsequently continued and reset for March 4, 1971 (Certified Docket En-

tries). Counsel for the parties were unable to agree upon the preparation of a joint document stating the issues and the uncontested facts, and therefore each party filed a separate statement as to its respective position on the issues and facts. These statements were filed on March 3, 1971 (Certified Docket Entries). On March 4, 1971, District Court entered a pre-trial order, estimating that the time required for the trial of the cause would be one month (App. 248, 251).

On March 5, 1971, Chamberlain, joined in by all other parties to the Pack-Kahn Action except Sterling, filed a motion in State Court requesting: (a) that the pleas in abatement filed by Sterling on May 3, 1968 be set for hearing on March 12, 1971; (b) that the Pack-Kahn Action be set for trial on its merits on May 3, 1971 and (c) offering to consent to the entering of an order by State Court authorizing the use in the trial in that court of all evidence, documentary and otherwise, produced or obtained by any party in the Jett-Chamberlain and Sterling Actions, to the same extent that the same would be admissible in evidence had it been obtained through discovery in State Court (Appendix A to Brief). On March 8, 1971, State Court entered an order setting the Pack-Kahn Action for trial on May 4, 1971, without hearing oral argument from counsel for any party (Appendix B to Brief). On March 26, 1971, Sterling moved the State Court for an order of continuance of the Pack-Kahn Action. After hearing oral argument, this motion was denied by State Court on that date (Appendix C to Brief). On March 26, 1971, counsel for the parties argued the pleas in abatement which had been filed by Sterling, and on that date State Court took these matters under submission (Appendix D to Brief). On April 1, 1971, State Court entered an order holding Sterling's pleas in abatement to be insufficient (Appendix E to Brief), and requiring the parties to file such pleadings as they deemed desirable on or be-

fore April 16, 1971. By order dated April 23, 1971 (Appendix F to Brief), State Court set the Pack-Kahn Action for pre-trial on April 28, 1971, on which day a pre-trial conference was held, and on May 3, 1971, State Court entered a pre-trial order (Appendix G to Brief) and determined that Sterling had rejected the offer to use in the Pack-Kahn Action the discovery obtained in federal court; it aligned the parties as to their respective interests; and determined that the case would be tried in three phases, stating as follows:

> ". . . that the trial of the case shall proceed first to a determination of the issues of the validity of the 'Sterling Agreement', secondly, to a consideration of the issues relating to the construction of the 'Sterling Agreement', and thirdly, to the issues relating to accounting only if and after the Court has concluded that the 'Sterling Agreement' is valid and after the issues relating to construction have been determined by the Court." (Appendix G to Brief.)

While the parties were preparing for the trial of the Pack-Kahn Action in State Court, Sterling filed in District Court on April 15, 1971 a Motion for Preliminary Injunction (App. 290-293), and a Petition for Preliminary and Permanent Injunction (App. 260-273). In its Motion for Preliminary Injunction, Sterling requested District Court to enjoin Jett, Chamberlain, Pack, Kahn, Jett Drilling and all persons in concert or participation with them from in any manner prosecuting the Pack-Kahn Action in State Court, and alleged for the first time in this litigation that the prosecution of the Pack-Kahn Action (1) would deprive District Court "of its first acquired jurisdiction" over the mineral leases involved in the litigation, (2) would preclude District Court "from enforcing Sterling's equitable interest as a lien on the oil, gas and mineral leases" involved in this litigation, and (3) would preclude

District Court from "enforcing Sterling's equitable interest in the Citronelle-Mobile Gathering System" (App. 271).

On April 20, 1971, Sterling's Motion for Preliminary Injunction came on for hearing in District Court before Judge Pittman and, after the introduction of evidence and extensive argument of counsel, District Court on April 28, 1971, entered an order holding the litigation to be *in personam,* and denying Sterling's Motion for Preliminary Injunction (App. 299-302). The court did not rule on Sterling's Petition for Preliminary and Permanent Injunction, and no request was made by Sterling that it do so.

On April 28, 1971, Sterling filed a notice of appeal from Judge Pittman's order denying its Motion for Preliminary Injunction, which appeal was docketed in this Court as Appeal No. 71-1763, and on the same day, Sterling filed in District Court a motion for injunction pending that appeal, seeking to preserve the status quo of the litigation pending the appeal (App. 374, 380). On April 29, 1971, District Court denied that motion, holding that:

> "[T]o stay the effect of this court's order of April 28, 1971 denying the injunction against the state court trial pending appeal of that order would, by indirection, accomplish the delay of that trial which this court has denied on its merits."

On April 28, 1971, Sterling also filed in this Court in connection with Appeal No. 71-1763 a motion for an injunction pending appeal, requesting an emergency hearing from this Court (Appendix H to Brief). This motion was heard on Saturday, May 1, 1971, before the Honorable Joe Ingraham, Circuit Judge, in his chambers in Houston, Texas, and on that date he denied Sterling's motion (Appendix I to Brief). On May 3, 1971, Sterling filed a tele-

graphic motion with this Court requesting reconsideration of Judge Ingraham's order denying the request for the status quo injunction (Appendix J to Brief), and on May 4, Judge Ingraham denied this motion for reconsideration (Appendix K to Brief), stating that the consideration of Sterling's motion for injunction pending appeal would be held by a panel of this Court pursuant to Rule 8 FRAP and Local Rule 10(b). On May 17, 1971, this Court, speaking through Brown, C. J., and Ingraham and Roney, Circuit Judges, denied Sterling's petition for injunction pending appeal (Appendix L to Brief) and on September 10, 1971, this Court granted Chamberlain's motion to dismiss Appeal No. 71-1763 on account of Sterling's failure to prosecute same (Appendix M to Brief).

While Sterling was attempting to enjoin the trial of the Pack-Kahn Action through the federal courts, and having failed to obtain a stay of the Pack-Kahn Action in State Court, Sterling filed on April 29, 1971 in the Supreme Court of Alabama an Application for Prohibition or Other Appropriate Relief, seeking to prohibit State Court from proceeding with the trial of the Pack-Kahn Action on the grounds, *inter alia*, that the litigation is *in rem* or *quasi in rem*. A hearing on this application was held on April 30, 1971 in the Supreme Court chambers in Montgomery, Alabama, and on May 3, 1971, this application was denied by that court (App. 308, 315).

On May 3, 1971, one day before the Pack-Kahn Action was to commence, District Court entered an order setting the Jett-Chamberlain Action for trial on July 12, 1971 (App. 303).

The trial of the Pack-Kahn Action commenced on May 4, 1971, before Judge Robertson, sitting without jury, and proceeded thereafter without substantial interruption until June 18, 1971, at which time the trial of the issues

relating to the validity *vel non* of the Sterling Agreement was concluded. The Court heard arguments from all counsel and required the filing of briefs (App. 308, 316). On July 10, 1971, Judge Robertson entered an interlocutory decree finding the Sterling Agreement to be valid, and reserving for future determination all controversies between the parties with respect to the meaning and enforceability *vel non* of the specific provisions of the Sterling Agreement. Judge Robertson then recessed the trial of the Pack-Kahn Action until July 26, 1971 (App. 308, 317).

The trial of the first phase of the Pack-Kahn Action required twenty-four court calendar days and effectively consumed the time of eleven lawyers for a period of approximately six weeks. The daily transcript (without exhibits incorporated therein) at that time exceeded 4,000 pages. During the first phase of the trial, over 850 exhibits had been introduced by all parties: Pack and Kahn introduced 317; Chamberlain introduced 20; Kemp introduced 10; Jett introduced 8; and Sterling introduced 510. Of the six witnesses who testified during the first phase, Chamberlain was on the witness stand for a total of 17 days, of which 6 days were taken up in direct examination, and 11 days were taken up in cross-examination by counsel for Sterling (App. 308, 317).

On July 12, 1971, the day which had been set for trial of the Jett-Chamberlain Action, Chamberlain, Jett, Pack, Kahn, Cornwall, Equity and Kemp moved District Court to stay the trial of the Jett-Chamberlain Action and Sterling Action pending the outcome of the trial of the Pack-Kahn Action in State Court, and filed in support thereof an affidavit of Bart B. Chamberlain, Jr. and Harold D. Parkman (App. 304-322). On July 14, 1971, District Court granted the motion to stay (App. 361). On July 15, 1971, Sterling requested District Court to take

under submission the **Petition** for Permanent Injunction which it had filed on April 15, 1971, on the basis of the evidence taken at the hearing on its **Motion** for Preliminary Injunction held on April 20, 1971 (App. 363). Sterling did not ask for a hearing on this Request for Submission, and on July 16, 1971, District Court denied Sterling's Petition for Permanent Injunction (App. 364). On August 2, 1971, Sterling filed a notice of appeal from this order (App. 366). Appeal No. 71-2745 arises out of the denial of this Petition for Permanent Injunction. On November 1, 1971, Sterling "amended" its notice of appeal in No. 71-2745 to include the order of July 14 staying further proceedings of the Jett-Chamberlain Action in District Court (App. 367).

On August 2, 1971, State Court proceeded with the trial of the second phase of the Pack-Kahn Action, and, after oral argument and the filing of briefs by the parties, on November 4, 1971 entered a final decree withdrawing the interlocutory decree of July 10, 1971, and concluding that the Sterling Agreement "is invalid, unenforceable and without legal force or effect." Said decree also found that Sterling was due a "finder's fee" and the court continued the cause until November 22, 1971, for the purpose of determining the amount of such fee and how such fee was to be apportioned among the parties (App. 387-391). On November 3, 1971 Sterling had filed in the Pack-Kahn Action a "withdrawal of disclaimer"[1] (Appendix N to Brief), and State Court on November 29, 1971, entered a final decree, incorporating the decree of November 4, 1971, and determining the amounts due Sterling and apportioning same among Pack, Kahn, Jett, Chamberlain, Cornwall and Kemp (App. 391-394). As a result of the withdrawal

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[1] This is the "disclaimer" which Sterling had filed in this Court on April 22, 1965, and which was referred to in **Jett v. Zink.**

of the disclaimer, State Court entered a money judgment in favor of Sterling and against Pack, Kahn and Cornwall in the amount of $143,800.31. The State Court awarded Sterling a total money judgment of $500,175.00, including principal and interest, which has been paid into the Registry of that court, in full.

On December 2, 1971, Jett and Chamberlain amended their complaint, third-party complaint and answer to counterclaim in the Jett-Chamberlain Action, and their answer and third-party complaint in the Sterling Action, to allege that the decree of State Court of November 29, 1971 was a final judgment and therefore *res judicata* as to the issues raised in the federal litigation (App. 372). On December 3, 1971, Jett and Chamberlain filed motions for summary judgment accompanied by affidavit and exhibits, moving the court to dismiss the Jett-Chamberlain Action and the Sterling Action (App. 373-394). Pack, Kahn, Cornwall, Equity and Kemp filed motions for summary judgment on the same grounds and requesting the same relief (App. 394). Sterling filed no affidavits and introduced no evidence at the hearing on the motions for summary judgment.

On January 27, 1972, District Court entered its order granting the motions for summary judgment, thereby dismissing the Jett-Chamberlain Action and Sterling Action (App. 395). On February 16, 1972 Sterling filed its notice of appeal from the order of the District Court granting the motions for summary judgment (App. 398), which is Appeal No. 72-1637.

ARGUMENT

I

This Court Has Previously Determined the Question of State Court's Jurisdiction Over the Pack-Kahn Action in Its Decision in JETT v. ZINK, and Sterling Is Therefore Barred From Relitigating the Question.

In 1963 Sterling attempted to prevent the trial of any part of this litigation in State Court by (1) removing the Pack-Kahn Action on the grounds of "fraudulent joinder," (2) by removing the Jett-Chamberlain Action and successfully resisting the intervention of Pack, Kahn and Cornwall (whose presence would have required remand) on the implicit theory that this action is *in personam*, contending that the Sterling Agreement does not give Sterling any interest in real property, creating merely "personal obligations" on Jett and Chamberlain, and (3) by filing in this Court a "disclaimer" of any right of action against Pack, Kahn and Jett Drilling, the plaintiffs in the Pack-Kahn Action. As is clear in **Jett v. Zink**, this Court agreed only with Sterling's contentions in the **Jett-Chamberlain Action** (refusing to remand that case to State Court), but disagreed with Sterling's contentions as to the proper jurisdiction of the Pack-Kahn Action, holding that that case had been improperly removed and ordering that it be remanded to State Court, concluding that:

> "The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case." **(Jett v. Zink**, p. 730).

Thus, this Court has already settled the question of the jurisdiction of State Court over the Pack-Kahn Action,

and Sterling is barred from relitigating that point by the doctrine of *res judicata*, by the law of the case and by the principle of preclusion against inconsistent positions.

A. The Decision of This Court in JETT v. ZINK Remanding the Pack-Kahn Action Is *Res Judicata*.

As Sterling recognized in its brief to this Court of December 26, 1966 (App. 611), Sterling has know since June 23, 1966 that it would have to litigate the validity of the Sterling Agreement ultimately in State Court, unless of course a prior final judgment was obtained in the Jett-Chamberlain Action, and in any event, Sterling knew that it would have to litigate in State Court with all parties other than Jett and Chamberlain, regardless of the outcome of the Jett-Chamberlain Action, since those parties were refused admittance to the Jett-Chamberlain Action and were only brought in as third party defendants in March of 1971. In spite of that knowledge, Sterling has on numerous occasions since then attempted to prohibit the trial of the Pack-Kahn Action in State Court; and, when it became apparent in 1971 that the Pack-Kahn Action would be tried and concluded in State Court prior to the trial and disposition of the Jett-Chamberlain Action, and not until then—after eight years of litigation—did Sterling contrive the theory that the Jett-Chamberlain Action is *quasi in rem*, in an eleventh-hour attempt to oust the jurisdiction of State Court over the Pack-Kahn Action.

It is undisputed that the parties to these appeals are the same who were before this Court during the **Jett v. Zink** appeal, and that the amendments to the pleadings in the Jett-Chamberlain Action which were made subsequent to that decision merely asserted additional grounds going to the question of the invalidity of the Sterling Agreement. Thus, the posture of the case with respect to the parties, pleadings and issues have not changed in any

material respect since June 23, 1966. The only change has been Sterling's position as to its theory of the case, which has changed from its prior position before this Court and, in any event, is not correct as a matter of law.

Sterling's attempt to enjoin the Pack-Kahn Action on the eve of the trial of that cause in State Court was, in sum and substance, an attempt to relitigate the issue of the jurisdiction of State Court over the Pack-Kahn Action, and was based solely upon Sterling's change in its theory of the cause of action. Such attempt is in direct collision with the doctrine of *res judicata*, for it is settled that this doctrine is applicable not only to fully litigated issues on the merits of a controversy, but is equally applicable to the issue of jurisdiction. **Brotherhood of Loc. Fire. & Eng. v. Seaboard Coast Line R. Co.**, 413 F.2d 19 (5th Cir. 1969), **cert. denied**, 396 U.S. 963 (1969); and **Acree v. Air Line Pilots Association**, 390 F.2d 199 (5th Cir. 1968), **cert. denied**, 393 U.S. 852 (1968). The fact that Sterling has now changed its theory of the case is insufficient to escape the bar of *res judicata*. **Acree v. Air Line Pilots Assocation**, *supra*; **Reiter v. Universal Marion Corporation**, 299 F.2d 449 (D.C. Cir. 1962); and **Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.**, 295 F.2d 362 (5th Cir. 1961). A mere change of theory will not prevent the application of the doctrine. "A litigant is bound to bring forward all theories available to him, and second thoughts are not sufficient to open a case already closed." **Sexton v. United States**, 238 F. Supp. 221, (N.D. Ill. 1965).

In **Retail Clerks Local No. 1564 v. Your Food Stores**, 225 F.2d 659 (10th Cir. 1955), an employer had obtained in state court an injunction prohibiting a union from picketing and interfering with its operation of its business, which was removed to federal court and thereupon dissolved on the grounds that state court jurisdiction had

been pre-empted by the National Labor Management Relations Act. When the NLRB rfused to take jurisdiction of the matter, the employer filed another action in state court and obtained another temporary injunction based upon a new allegation that the picketing constituted a "trespass" to the premises. The union filed an action in federal district court, seeking relief from the state court's injunction. The district court refused to interfere with state court injunction, recognizing its jurisdiction to deal with the issue of "trespass", and the union appealed. In reversing the district court, the court of appeals stated at 662-663 that:

> "Res judicata looks to substance, not shadow, and the more comprehensive finding embraces the more limited. If the Store wishes to attack the validity of Judge Bratton's holding the proper avenue was a prompt appeal to this court for review. It cannot let the judgment become final, acquiescing in its effect, **and then by variation of theory again seek substantially the same remedy previously denied; and, thereby by collateral attack vitiate the effect of the prior final judgment.**" [emphasis added].

Despite this Court's ruling in **Jett v. Zink**, Sterling has on numerous occasions attempted to deprive State Court of jurisdiction of the Pack-Kahn Action by (1) removing that case to federal court a second time; (2) filing in that court pleas in abatement on the grounds of a prior action pending; (3) seeking to prohibit the state trial judge from hearing the case by requesting a writ of prohibition from the Alabama Supreme Court; and (4) changing its theory of the cause of action from *in personam* to *quasi in rem*, a change that occurred not until April of 1971, eight years after the litigation had commenced and nineteen days before the Pack-Kahn Action was due to be tried. We submit that the refusal of Sterling to abide by

the decisions of four separate courts on the question of jurisdiction of the Pack-Kahn Action is exactly the type of contentious litigation that the doctrine of *res judicata* was designed to prevent. As this Court stated in **Bennett v. Commissioner of Internal Revenue**, 113 F.2d 837, 839 (5th Cir. 1940):

> "Res judicata rests on a rule of public policy designed to put an end to mere contentious litigations. Under that rule an issue once finally settled by the judgment of a court of competent jurisdiction, remains settled. 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties' [Citations omitted]."

B. **The decision of this court in** JETT V. ZINK **determining the question of state court jurisdiction of the Pack-Kahn Action is the law of the case.**

In addition to the fact that this Court's decision in **Jett v. Zink** is *res judicata* on the question of the proper forum for the trial of the Pack-Kahn Action, it also constitutes the law of the case in this litigation, since it was rendered in this case on a prior appeal between the same parties. As this Court stated in **White v. Murtha**, 377 F.2d 428, 431-432 (5th Cir. 1967):

> "The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premises that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members,' and that it would be impossible for an appellate court 'to perform its duties

> satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof [Citations omitted]."
>
> "While the 'law of the case' doctrine is not an inexorable command, **a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court,** unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. [Citations omitted.]" [Emphasis added.]

Furthermore, ". . . some good reason must be shown why the prior ruling is no longer applicable or should not be followed, in order to justify a departure therefrom." **Poster Exchange Inc. v. National Screen Service Corp.,** 362 F.2d 571, 574 (5th Cir. 1966). Not only has Sterling failed to submit any good reason why this Court should depart from its previous ruling, it has failed to show any reason whatsoever. The present appeals are based entirely upon Sterling's change of position in the case, which was obviously contrived for the sole purpose of attempting to prevent the trial of the Pack-Kahn Action in State Court.

C. **Sterling is precluded from taking an inconsistent position from that asserted by it when** JETT V. ZINK **was on appeal to this court.**

The question before this Court when the Jett-Chamberlain Action was on appeal in 1964 was whether Pack, Kahn, Cornwall, Jett Drilling and Four States, as owners

of interests in the mineral leases and in the gathering system, were indispensable parties to an action to construe the Sterling Agreement, which agreement purported to affect those interests. It was contended by Jett, Chamberlain, Pack and Kahn that Pack, Kahn and Cornwall, as owners of interests in these leases and in the pipeline, would be directly affected by any judicial determination of the Sterling Agreement. If these absent parties had been held to be indispensable, then diversity of citizenship would have been destroyed, requiring that the Jett-Chamberlain Action be remanded to State Court.

Sterling and its trustees, represented then and now by Willis C. Darby, Jr., Esq., took the position and argued effectively that the Sterling Agreement created merely personal obligations of only Jett and Chamberlain to Sterling and its trustees. The following quotations are taken from Mr. Darby's brief filed in this Court on November 25, 1964:

> "The Jett-Sterling agreement was carefully drawn to make the obligations of Jett and Chamberlain personal obligations to Zink and Smyth **and to prevent Sterling and its Trustees from acquiring any interest in any real property in Mobile County, Alabama.** Sterling itself, has no rights under the Jett-Sterling agreement, all obligations of Jett and Chamberlain run to Zink and Smyth as trustees for Sterling" (App. 588; emphasis added).

> "**The Jett-Chamberlain complaint sets forth a simple action for a declaratory judgment between all parties to a written contract to declare the contract null and void or in the alternative to construe the contract in a manner desired by Jett and Chamberlain.** The only proper parties to an action to determine the validity of a contract or to construe a contract are the parties to the contract" (App. 586; emphasis added).

"The obligations of Jett and Chamberlain under the Jett-Sterling agreement are **personal obligations** for Jett and Chamberlain to pay money to Sterling's trustees and **personal obligations** for Jett and Chamberlain to transfer interest in certain oil royalties to Sterling's trustees in the future" (App. 588; emphasis added).

"In the Jett-Chamberlain action no relief was asked of anyone other than Zink, Smyth and Sterling. **The counterclaim in the Jett-Chamberlain action asks for no relief other than relief from Jett and Chamberlain**" (App. 588; emphasis added).

"Neither Pack, Kahn, Cornwall, Jett Drilling nor Four States derive title to any property or lease through the Jett-Sterling agreement. **The Jett-Sterling agreement by its own carefully drawn terms is a mere contract to pay money and to transfer certain oil royalties in the future**" (App. 590; emphasis added).

"Moreover, the obligation of Jett and Chamberlain to convey an override to Sterling's Trustees is personal to Jett and Sterling [*sic*; the reference is obviously to Chamberlain]. The carefully drawn Jett-Sterling agreement specifically provided:

> Nothing in this Agreement contained shall operate as a conveyance to Sterling, or to any trustee of Sterling, **of an estate in land, nor shall the same operate as a conveyance or assignment of any interest whatsoever in any lease**; it being the intention of all the parties to this Agreement that nothing shall vest in Sterling, or in any of its trustees except under documents duly executed, acknowledged and delivered in pursuance hereof" (App. 592; emphasis added).

"There is no allegation that Sterling or its Trustees have made or intend to make any demand on any person other than Jett and Chamberlain to fulfill the **personal obligations of Jett and Chamberlain under the Jett-Sterling agreement . . . Indeed, Zink, Smyth and Sterling have filed a counter-claim against Jett and Chamberlain to achieve full compliance with the Jett-Sterling agreement or damages for the breach thereof**" (App. 592; emphasis added).

"The record fully establishes that Pack, Kahn and Cornwall acquired their 25% interest free and clear of any claim by Sterling; Sterling admits that Pack, Kahn and Cornwall's 25% interest is free and clear of any claim of Sterling or its Trustees. Sterling does not now nor has it ever, contended that it has any claim against Pack, Kahn and Cornwall's 25% interest" (App. 594).

These contentions of Sterling's counsel were obviously effective, since this Court held that the cause of action alleged in the pleadings was not such as to make Pack, Kahn and Cornwall indispensable parties to the litigation, despite their admitted ownership in the mineral leases and the gathering system.

After having successfully urged this Court to adopt its theory of the case at that time, but having failed to prevent the remand of the Pack-Kahn Action to State Court, Sterling on April 15, 1971 (approximately six weeks after that case had been set for trial in State Court), filed in District Court a Petition for Preliminary and Permanent Injunction, alleging for the first time that the trial of the Pack-Kahn Action would deprive District Court of "its first acquired jurisdiction over the oil, gas and mineral interests described in the lis pendens" and would preclude District Court "from enforcing Sterling's equitable interests as a lien on the oil, gas and mineral

leases described in the lis pendens and in the gathering system."[2] In short, Sterling now has taken the position that the Jett-Chamberlain Action is *quasi in rem*, which position incidentally is unsupported by the pleadings or facts in the record. Even so, had Sterling taken the position it has adopted now when this case was before the Court in 1966, we submit that the decision in **Jett v. Zink** would have been entirely different. Had Sterling **then** claimed an **equitable lien** on the mineral leases (25% of which were owned by Pack, Kahn and Cornwall) and on the gathering system (28.75% of which was owned by Pack, Kahn and Cornwall), the indispensability of Pack, Kahn and Cornwall in the Jett-Chamberlain Action would have been evident.

Having obtained the fruits of its previously advocated *in personam* theory, Sterling should not now be permitted to urge upon this Court that the litigation is *quasi in rem*. The rule against taking inconsistent positions has been succinctly stated by this Court in **Texas Co. v. Gulf Refining Co.**, 26 F.2d 394, 397 (5th Cir. 1928):

> "A party, who in litigation with his adversary has, with knowledge of the facts, asserted a particular claim, title, or right, cannot afterward assume a position inconsistent with such claim, to the prejudice of the same adversary, who has acted in reliance on

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[2] It should be noted here that District Court was not called upon to rule on this petition for injunction at this time. It was only on July 15, after the trial of the first phase of the Pack-Kahn Action had been concluded, that Sterling requested the Court to take under submission this petition, together with the exhibits presented during the hearing on Sterling's **Motion** for Preliminary Injunction held April 20, 1971. An order had been entered on April 28, 1971 denying the **Motion** for Preliminary Injunction and an appeal had been taken therefrom which appeal was subsequently dismissed by this Court on September 10, 1971. Appeal No. 71-2745 is from the District Court's order of July 16, 1971, refusing to grant the **Petition** for Preliminary and Permanent Injunction submitted on July 15, 1971.

such claim in being as it was previously made; **in other words, a party who, for the purpose of maintaining his position in litigation, has deliberately represented a thing in one respect, is estopped to contradict his own representation by giving the same thing another aspect in litigation with the same adversary as to the same subject-matter** [Citations omitted]" (Emphasis added).

Stated another way,

"Preclusion against inconsistent positions is designed to prevent a litigant **from leading a court to find a fact one way in one proceeding, and then simply because his interest have changed lead the court to find another way in a subsequent proceeding**. . . . Having received a benefit in the first trial, a party is precluded from changing his position to obtain another benefit in the second trial" (Emphasis added). **Gottesman v. General Motors Corporation,** 222 F. Supp. 342, 344 (S.D.N.Y. 1963).

As stated in **Scarano v. Central R. Co. of New Jersey,** 203 F.2d 510, 513 (3rd Cir. 1953), "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate" (Emphasis added). See also, **Roth v. McAllister Bros., Inc.,** 316 F.2d 143 (2nd Cir. 1963); **Eads Hide & Wool Company v. Merrill,** 252 F.2d 80 (10th Cir. 1958); and **American Home Assurance Co. v. American Fidelity,** 261 F. Supp. 734 (S.D.N.Y. 1966).

Iselin v. La Coste, 147 F.2d 791 (5th Cir. 1945), is particularly appropriate. Plaintiffs brought a diversity action in federal district court of Mississippi, seeking a declaration that they were the owners of land in the Mississippi River which, **by accretion,** had become at-

tached to the shore of Warren County, Mississippi. After suffering an adverse judgment, plaintiffs brought another diversity action in federal court in Louisiana, alleging this time that the subject property was in Madison Parrish, Louisiana, instead of Warren County, Mississippi, and that the changes in boundaries were brought about **by avulsion** rather than by accretion as asserted in the prior suit, and that even though the lands were attached to the Mississippi shore, they were in law still a part of the state of Louisiana. When defendants moved for summary judgment on the grounds of *res judicata,* plaintiffs alleged that the Mississippi federal court had been without jurisdiction to determine the title to lands located in Louisiana. This Court, after first noting that it was now "confronted with the vagaries of the River as well as the vagaries of counsel for Plaintiffs," held, at 794, that:

> "Not only was the judgment of the Federal Court in Mississippi res judicata on the issues involved for decision **but it was res judicata in this collateral action on the question of jurisdiction where the record does not show the absence of jurisdiction**" (Emphasis added).

As to the allegations that the venue was improperly laid in the Mississippi federal court, this Court concluded that:

> "In the first case the Plaintiffs not only did not raise any question as to any venue **but had the Court to take the case on their allegations of jurisdiction and venue. They cannot now be heard to make a delayed and different assertion in a second and collateral proceeding.**" *Id.*, at 795 (Emphasis added).

We submit that by reason of the principle of *res judicata,* by reason of the law of the case doctrine, and by

reason of the doctrine of preclusion against inconsistent positions, Sterling is barred from relitigating the question of the jurisdiction of State Court over the Pack-Kahn Action.

II

In Any Event, the Record Clearly Shows That the Jett-Chamberlain Action Is an Action *In Personam.*

The obvious purpose of Sterling's *volte face* respecting its theory of the case is to invoke the doctrine of prior jurisdiction, since the Pack-Kahn Action was filed a few months subsequent to the Jett-Chamberlain Action. This rule has been succinctly stated by the Supreme Court in **Penn General Casualty Co. v. Pennsylvania,** 294 U.S. 189, 195 (1935):

> "Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res judicata in the other. . . . But if the two suits are in rem or quasi in rem, **requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought,** the jurisdiction of one court must of necessity yield to that of the other" (Emphasis added).

A review of the pleadings in the Jett-Chamberlain Action shows clearly that it is *in personam.* Jett and Chamberlain pray that the Court "render a declaratory judgment and decree defining the rights of the parties, and declaring that said agreement" is null and void, and if they be mistaken in that belief, then they pray that the court

"will render a declaratory judgment and decree defining the rights of the parties" in certain respects favorable to their interests (App. 45-48). In its answer to the complaint (App. 88), Sterling merely admitted and denied the various paragraphs of the complaint, and filed therewith a counter-claim asserting that Jett and Chamberlain had breached the Sterling Agreement by failing to perform certain personal obligations imposed upon Jett and Chamberlain by the terms of said agreement (App. 91). Sterling prayed only for an accounting from Jett and Chamberlain and for a judgment for the amount found to be due under the accounting. In addition, Sterling requested a declaration of the rights of Sterling in the "deep rights," which the agreement purported to allow Sterling's trustees to earn by participating in the cost of drilling of a test to determine the productivity of the deeper horizons under the mineral leases. Sterling did not pray that Jett and Chamberlain be required to specifically perform their obligations under the agreement, nor did it pray that the court take custody, control or possession of the mineral leases or gathering system, nor did it allege the existence of or seek to establish a lien (equitable or otherwise) on any of the mineral leases or the gathering system, nor did it ask for the appointment of a receiver. In fact it has never requested any such relief. Nevertheless, Sterling has chosen to ignore the case made out by the pleadings, and has now asserted that the Jett-Chamberlain Action is *quasi in rem* because (1) **Jett and Chamberlain** are attempting to quiet title to their mineral interests,[3] (2) Sterling has demanded an accounting of Jett and Chamberlain, and (3) Sterling has prayed for specific perform-

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[3] This tactic is reminiscent of Sterling's "disclaimer" filed in the Pack-Kahn Action on the prior appeals, when this Court refused to give effect to such contrivances with the statement that "it is not for defendants to shape plaintiffs' cases." (Jett v. Zink, p. 730.)

ance of Jett and Chamberlain's obligations under the Sterling Agreement. An examination of each of these theories shows that they are completely without merit.

A. **The Jett-Chamberlain action is not an action to quiet title.**

To begin with, it should be noted that Alabama has two title quieting statutes, one apparently *in personam* (Title 7, § 1109 *et seq.*, **Code of Alabama of 1940**, Recompiled 1958), and the other *in rem* (Title 7, § 1116 *et seq.*, **Code of Alabama of 1940**, Recompiled 1958). The former action requires personal service on a party before he will be bound by the decree, and the latter action will bind all parties owning interest, joined or not, after giving such notice as accords with due process of law. The purpose of a quiet title action is to determine whether a **defendant** has any title, right or claims in the subject property, and to determine the character of such title. It is not the purpose of a quiet title action to declare the title of the **plaintiff. Merchants Nat. Bank of Mobile v. Hall**, 278 Ala. 319, 178 So.2d 146 (1965). While Sterling's counsel has not advised us under which of these statutes Jett and Chamberlain are supposedly proceeding, the law is clear in Alabama that certain jurisdictional allegations must appear in a bill to quiet title:

> "The right to quiet title conferred by our statute is in any person: (1) when he is in peaceable possession of the land, whether actual or constructive, claiming to own the same in his own right, or in a representative capacity; (2) when his claim is denied or disputed or when any other person claims or is reputed to own the same or any part thereof; and (3) no suit is pending to enforce or test the validity of such title or claim. . . ."

* * * * * * *

> **"Thus are specifically declared the jurisdictional facts on which depends the right to deal with the res.** Code Sec. 5443." **Gill v. More,** 200 Ala. 511, 76 So. 453, 457 (1917) (Emphasis added).

The complaint fails to show even one of these jurisdictional allegations; thus, a judgment rendered on this complaint could not "quiet title" to anything, assuming a court would even have entertained the suit on that theory.

B. **The demand of Sterling for an accounting does not render the Jett-Chamberlain action a *quasi in rem* proceeding.**

Sterling relies almost exclusively on **Princess Lida of Thurn and Taxis v. Thompson,** 305 U.S. 456 (1938) for the proposition that the Jett-Chamberlain Action is *quasi in rem* because of the accounting demanded by Sterling. However, this case does not support Sterling's position **since it involved a statutory accounting by trustees as to their administration of a trust fund,** and the statute gave the the Pennsylvania state court extensive powers over the trustees and the administration of the trust and the funds constituting the corpus thereof. The question before the court was whether a subsequent action filed in federal district court sought relief of such nature as to interfere with the administration of the trust pending before the state court. The Supreme Court held that a judgment in the federal court entered on the relief prayed for therein would in fact interfere with the administration of the trust by the state court and thereupon upheld the injunction against the proceeding in the federal district court.

None of the parties in the Jett-Chamberlain Action and none of the parties in the Pack-Kahn Action have requested either court to administer or take custody or control of the mineral leases or gathering system or the pro-

ceeds therefrom, either directly or indirectly, and neither court has sought to do so. Sterling's demand for an accounting is merely a personal demand against Jett and Chamberlain to account to Sterling and its trustees for sums which it claims Jett and Chamberlain owe Sterling under the Sterling Agreement. Such a demand for accounting simply does not constitute a *quasi in rem* proceeding. See, for example, **Kline v. Burke Construction Co.**, 260 U.S. 226 (1922), and **Mandeville v. Canterbury**, 318 U.S. 47 (1943), both of which actions were held to be *in personam*, despite the fact that plaintiffs had demanded accountings.

Sterling now asserts in brief that it has an equitable lien on the mineral leases and on the gathering system, and that Jett and Chamberlain hold the leases, the gathering system and the proceeds therefrom as constructive trustees for Sterling, citing **Porter v. Cooke**, 63 F.2d 637 (5th Cir. 1933), **cert. denied**, 317 U.S. 670; **Kasishke v. Baker**, 146 F.2d 113 (10th Cir. 1945), **cert. denied**, 325 U.S. 856; **Dayvault v. Baruch Oil Corp.**, 211 F.2d 335 (10th Cir. 1954); and **Shuford v. Anderson**, 352 F.2d 755 (10th Cir. 1965), **cert. denied**, 383 U.S. 935. A comparison of the pleadings in the Jett-Chamberlain Action with the causes of action stated in these cases shows, on the contrary, that Sterling is not entitled to an equitable lien and that Jett and Chamberlain are not constructive trustees. In the cited cases the plaintiffs each expressly alleged that the respective defendants were constructive trustees, prayed for the establishment of a trust and equitable lien, and asked the court to appoint a receiver of the subject property. The Jett-Chamberlain Action is completely devoid of any such allegations or prayers for relief. The prayer for general relief by Sterling will support a judgment based only upon the cause of action alleged in the pleadings, and cannot serve as a springboard to engraft a cause of action different from that shown by the allegations.

C. **The fact that Sterling has sought specific performance of Jett and Chamberlain in the Sterling Action does not preclude the trial of the Pack-Kahn Action in state court.**

At the outset, it should be noted that there is no demand for specific performance in the Jett-Chamberlain Action. The only demand for specific performance was made by Sterling in its amendment of September 3, 1965 to the complaint which it had filed in the **Sterling Action** on November 22, 1963. Thus, even if a demand for specific performance constitutes a *quasi in rem* action, this proposition is of no benefit to Sterling in its present endeavor, since that demand was made in a lawsuit filed subsequent to the Pack-Kahn Action. However, it is clear that in Alabama a court is not required to, and need not, have control of the subject property in order to grant relief by way of specific performance. **Hume v. Kirkwood**, 216 Ala. 534, 113 So. 613 (1927); and **Geo. E. Wood v. Morris**, 225 Ala. 281, 142 So. 508 (1932).

Finally, even assuming *arguendo* that the Jett-Chamberlain Action was quasi in rem, that alone would not *ipso facto* have precluded the trial of the Pack-Kahn Action, for it is settled that ". . . two actions may proceed without interference where one is *in rem* and the other is in personam, for irreconcilable conflict arises only when both actions seek to dispose of the same *res*." IA **Moore's Federal Practice**, 2d Ed. ¶0.222. In other words, a state court may properly adjudicate rights in property in the possession of a federal court and may render any judgment "not in conflict with the court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property." **United States v. Klein**, 303 U.S. 276, 281 (1938); and see **Fischer v. American United L. Ins. Co.**, 314 U.S. 549 (1942). The trial of the Pack-Kahn Action could not, and indeed did

not, disturb the "custody or possession" (if such there was) of any property within the control of District Court. As shown by the decree, State Court determined that the Sterling Agreement was invalid, and nevertheless entered a money judgment in favor of Sterling and against Jett, Chamberlain, Pack, Kahn, Cornwall and Kemp.

III

Sterling Is Barred From Re-litigating in This Court the State Court's Decision Determining Jurisdiction Over the Pack-Kahn Action.

The evident purpose of this appeal by Sterling is to nullify the state court's judgment rendered in the Pack-Kahn Action by permanently enjoining the parties from "seeking to enforce any judgment in their favor in the Pack-Kahn Action" (Sterling's Brief, p. 69). Sterling filed pleas in abatement in State Court in an attempt to abate the Pack-Kahn Action on the ground of a prior action pending, and on the ground of the alleged exclusive jurisdiction of District Court by reason of the asserted *in rem* nature of the proceeding, and these pleas in abatement were held insufficient. Having been heard on the question of State Court's jurisdiction by State Court itself and having lost that point, Sterling is now attempting to collaterally attack this determination of jurisdiction by State Court, rather than proceed through the normal courses of appeal first to the Alabama Supreme Court and if dissatisfied there, by petition for writ of certiorari or appeal to the United States Supreme Court. Indeed, as shown by the Alabama cases cited by Sterling on pages 21-25 of its brief, the question of whether the State Court was correct in proceeding is one of Alabama substantive law; hence, Sterlings' proper procedure for redress is through the Alabama courts.

A decision relating to jurisdiction either of the person or of the subject matter is not subject to collateral attack where it was made in proceedings in which the jurisdictional questions were in issue and in which the parties were given the full opportunity to litigate. **Strachman v. Palmer**, 177 F.2d 427 (1st Cir. 1949); **Breslerman v. American Liberty Insurance Company**, 218 F. Supp. 345 (S.D.N.Y. 1963); and **Hudson v. Lewis**, 188 F.2d 679 (5th Cir. 1951). Even where the issue of the **exclusiveness** of federal jurisdiction had been raised in and decided by a state court, the decision was *res judictata* and the issue could not be raised in subsequent federal court proceedings. **Alleghany Corporation v. Kirby**, 340 F.2d 311 (2nd Cir. 1965). The foregoing cases, including **Brown v. Chastain**, 416 F.2d 1012 (5th Cir. 1969), all teach that the proper procedure for Sterling to utilize in attacking State Court's determination of its own jurisdiction is by direct appeal to the Supreme Court of Alabama, and if that should fail to provide satisfactory results, then by appeal or by petition for writ of certiorari to the United States Supreme Court. Sterling's attempt to enjoin the Pack-Kahn Action proceedings at this stage could embroil this Court in unnecessary conflict with the courts of the State of Alabama.

IV

District Court Was Correct in Refusing to Enjoin the Prosecution of the Pack-Kahn Action by Reason of the Express Prohibitions of Title 28 U.S.C. Section 2283.

Appeal No. 71-2745 is taken from the order of District Court of July 16, 1971, denying Sterling's Petition for Temporary and Permanent Injunction which was submitted to District Court for determination on that day. At that point in the litigation, the first phase of the Pack-Kahn Action had been tried, consuming twenty-four court

calendar days, resulting in the introduction of over eight hundred and fifty exhibits and the compilation of over 4,000 pages of transcript of testimony. Most of these exhibits were introduced by Sterling, and cross-examination of Pack and Kahn's witnesses by Sterling's counsel consumed more than twice the amount of time taken on direct examination. At the conclusion of the first phase, State Court entered an interlocutory decree finding the Sterling Agreement to be valid and enforceable. These facts were made known to District Court by the affidavit dated July 12 of Bart B. Chamberlain, Jr. and Harold D. Parkman (App. 308). With the case in this posture, Sterling sought to obtain from District Court an injunction prohibiting the parties from proceeding with the trial of the Pack-Kahn Action.

In an effort to avoid the provisions of Title 28 U.S.C. § 2283 expressly prohibiting the interference by a federal court in state court proceedings, Sterling has contrived to cast the facts of the litigation so that it will fall into one or more of the enumerated exceptions to § 2283, the exceptions permitting an injunction being (1) "as expressly authorized by act of Congress," (2) "where necessary in aid of its jurisdiction," or (3) "to protect or effectuate its judgments."

The prohibitions of the statute are not to be taken lightly, as evidenced by a most recent pronouncement of the Supreme Court in **Atlantic Coast Line R. Co. v. Engineers**, 398 U.S. 281, 286-287 (1970):

> "On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a 'principal of comity' not a binding rule on the power of the federal courts. The argument implies that in certain

circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention . . . Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. **Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, to the state appellate courts and ultimately this Court.**" (Emphasis added.)

In the **Atlantic Coast Line** case, a railroad company had sought unsuccessfully in a federal court to obtain an injunction against a union's picketing of its switching yard, but had thereafter successfully obtained an injunction in a state court of Florida. About two years later, the union sought to dissolve the state court injunction on the basis of a subsequent decision of the United States Supreme Court in a different matter. The state court held that the Supreme Court decision was distinguishable and refused to dissolve the injunction. The union then obtained an injunction from the federal district court against the enforcement of the state court injunction, and this Court affirmed. The United States Supreme Court held that the federal injunction was not proper either to protect or effectuate the "judgment" of the federal court's prior denial of the railroad company's request for injunction, or as necessary in aid of the district court's jurisdiction, and that the issuance of the federal injunction was therefore precluded by § 2283. In rejecting the contentions of the union, the Supreme Court stated as follows, at 294:

"First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state

court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. [Citations omitted.] . . . Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be **'necessary in aid of'** that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments."

* * * * * * * *

"In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts. **Kline v. Burke Constr. Co.**, 260 U.S. 226, 67 L.Ed. 226, 43 S. Ct. 79, 24 A.L.R. 1077 (1922); **Cf. Donovan v. Dallas**, 377 U.S. 408, 12 L. Ed.2d 409, 84 S. Ct. 1579 (1965)." *Id.* at 295.

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." *Id.*, at 297.

This Court stated in **Pacific Indemnity Co. v. Acel Delivery Service, Inc.**, 432 F.2d 952 (1970) that "certain timeworn judicially declared exceptions do exist. Thus, it is said that where the jurisdiction over the proceeding is

in rem or *quasi in rem*, '[T]he state or federal court having custody of such property has exclusive jurisdiction to proceed.' " Whether this exception is in fact a judicially declared exception, or merely falls within the statutory exception permitting an injunction "in aid of jurisdiction" is immaterial, for, as we have shown previously, the Jett-Chamberlain Action is not *in rem* or *quasi in rem*. Nevertheless Sterling still insists that the injunction was necessary in order to "effectuate the judgment" of District Court, and in order to "aid its jurisdiction." An examination of the facts shows that Sterling was not entitled to take advantage of either of these exceptions.

In order to bring this case within the third exception to § 2283, Sterling places exclusive reliance upon the "partial summary judgment" rendered by District Court on November 3 and 15, 1966. However, that order was limited solely to the question of whether the Sterling Agreement was invalid by reason of Sterling's having failed to qualify as a foreign corporation in Alabama prior to the time the contract was entered into. It did not preclude the raising of additional defenses to its validity based upon economic duress and business compulsion which was subsequently brought into the litigation, and was not appealable as a matter of right as intimated by Sterling. The decision in **Coffman v. Federal Laboratories, Inc.**, 171 F.2d 94 (3rd Cir. 1948) establishes the proposition that a "partial summary judgment" is merely interlocutory **and is subject to revision by the trial court, having no res judicata effect.**

> "Subsection (d) [of Rule 56] simply provides for a method whereby the trial judge with the aid of counsel can point up the controverted issues. It is, moreover, similar to the pre-trial procedure provided for in Rule 16 and the matters determined and the issues so framed are not foreclosed in the sense that the

judge cannot alter his conclusions . . . Therefore, even if we accept the plaintiff's contention as to what was determined by the motion, the court was still free to alter its view as to interpretation of the orders at a later stage of the proceedings. *Res judicata* was not and is not applicable." *Id.*, at 98.

In fact, District Court refused to give any *res judicata* effect to the "partial summary judgment," or to expand the impact of that order to preclude the presentation of additional defenses to the asserted validity of the Sterling Agreement. On May 21, 1968, Sterling filed a motion to strike these additional defenses on the grounds, *inter alia*, that they sought to go behind or upset the partial summary judgment (App. 167). In its order of March 11, 1971, District Court denied this motion to strike. Moreover, at the time that District Court denied Sterling's petition for injunction on July 16, 1971, the State Court had entered an interlocutory decree determining the validity of the Sterling Agreement. Therefore, there was no compelling reason for District Court to enjoin further prosecution of the Pack-Kahn Action, in order to "effectuate" this partial summary judgment. This case is far different from **Sperry Rand Corporation v. Rothlein**, 288 F.2d 245 (2nd Cir. 1961), on which Sterling places great emphasis. The **Sperry Rand** case was an employer's action against its former employees for misappropriation of trade secrets and confidential processes. The suit was filed in federal court and pursuant to pretrial order, the plaintiff employer was granted priority of discovery and allowed to proceed and complete its discovery prior to the commencement of discovery by the defendants. After the plaintiff had completed its discovery but before defendants had commenced theirs, plaintiff filed suit in state court seeking to introduce in evidence the discovery which it had obtained from the defendants in federal court. In sustaining the order

of injunction of the district court **which prohibited the employer from using in state court litigation any information divulged in the discovery proceedings in federal court**, the Court of Appeals for the Second Circuit held that:

> ". . . Having once learned, during the course of extended discovery proceedings, where the relevant evidence was located and who could provide testimony regarding it, the plaintiff-appellant would then have enjoyed a distinct advantage in the state courts over the defendants, whose turn at federal discovery had not yet come, even had the plaintiff been required to use the state's discovery procedures before introducing its evidence. In order equitably to afford both parties a fair opportunity before the state courts it was necessary to deprive the plaintiff totally of the advantage it had as a result of the priority granted it in the federal discovery proceedings." *Id.*, at 248.

The order of the federal court in **Sperry Rand** did not prohibit the trial of the case in state court, it merely prohibited the **use** of the evidence obtained in federal court discovery procedure. Here, Sterling was attempting to permanently prevent the trial itself.

Sterling cites many cases allegedly in support of its proposition that District Court should have issued an injunction to (1) protect its "unfettered authority to write a decree," (2) to protect the jurisdiction of a removed action, and (3) to prevent harassing and vexatious litigation. Not only is Sterling attempting to engraft additional exceptions on § 2283, but the authority cited for these respective propositions does not support them, as we will demonstrate:

Capitol Service, Inc. v. National Labor Relations Board, 347 U.S. 501 (1954) involved a right created by the National Labor Relations Act and in fact, **Amalgamated**

Clothing Workers of America v. Richman Bros., 348 U.S. 511 (1955), also cited by Sterling, makes it clear that the federal judiciary favors a strict interpretation of § 2283, for this case held that a federal court may not enjoin a state court proceeding even though the subject matter of the controversy in state court involves facts arising under the Taft-Hartley Act, stating at 515-516 as follows:

> "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

Counsel for Sterling also places great reliance upon **Stewart v. Dunn**, 363 F.2d 591 (1966), but this case holds only that a federal district court has the power to issue a temporary restraining order to preserve the status quo for the period of time necessary for such court to determine whether or not it has jurisdiction of the parties and the litigation. The facts are not at all similar to the case before this court. **Koehring Company v. Hyde Construction Co.**, 282 U.S. 362 (1966), cited as a companion case to **Stewart v. Dunn**, was a per curiam decision holding only that the district court which issued the restraining order had the jurisdiction to do so. In fact, the Court of Appeals for the Tenth Circuit in **Hyde Construction Company v. Koehring Company**, 388 F.2d 501 (10th Cir. 1968), which is the case that ultimately settled the controversy, interprets the per curiam opinion of the United States Supreme Court quite differently from counsel for Sterling:

> "Koehring argues that the decision of the Supreme Court means that the federal injunction against the state court was valid. We do not read the opinion of the Supreme Court to intend such effect. The validity of the injunction is not discussed in spite of the fact that it was attacked on grounds which raised serious questions bearing on the relationship of federal and state courts." *Id.*, at 506.

The Court of Appeals then **dissolved** the injunction against the state court proceedings which had been issued by the district court and stated as follows:

> "The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings. The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the state proceedings." *Id.*, at 508.

Next, Sterling argues that it has a "right created by the removal statute" to have its controversy determined by the federal court, citing **Peters v. Standard Oil Company**, 174 F.2d 162 (5th Cir. 1949); **Armstrong v. Alliance Trust Co.**, 126 F.2d 164 (5th Cir. 1942); and **French, Trustee v. Hay**, 89 U. S. 250 (1875). This proposition is misleading, and to say the least, the citation of these cases evidences a quite casual approach to the law on the subject. These cases hold only that a federal court, after once having obtained jurisdiction of the removed state action, **has the power to enjoin the further prosecution of that action in state courts.** Without this power, the rights given under the removal statute obviously would be without effect. As this Court previously held, the Pack-Kahn Action is **not** the same action as the Jett-Chamberlain Action, and was filed by Pack, Kahn and Jett Drilling with adequate legal justification.

Sterling also cites **American Ins. Co. v. Lester**, 214 F.2d 578 (4th Cir. 1954), for the proposition that §2283 does not forbid a federal court from enjoining a state court proceeding in aid of its jurisdiction in a declaratory judgment action for in personam relief. This case has been distinguished at least twice. In **Sexton v. Barry**,

233 F.2d 220, 224 (6th Cir. 1956), the Court stated that the federal court in **Lester** had "independent exclusive jurisdiction under the Federal Declaratory Judgment Act." Such is not the case here. The Jett-Chamberlain Action was brought initially in State Court under the Alabama Declaratory Judgment Act, as this Court held in **Jett v. Zink,** and since this is a removal case based upon diversity of citizenship, that is the law which would have controlled. In **Hyde Construction Company v. Koehring Company,** 388 F.2d 501, 509 (10th Cir. 1968), the **Lester** decision was further distinguished as follows:

> "The declaratory judgment provisions create no statutory exceptions to §2283. The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number of parties and to avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction."

Moreover, this Court has held in **Ballard v. Mutual Life Ins. Co. of New York,** 103 F.2d 388, 390 (5th Cir. 1940), that the Federal Declaratory Judgment Act (which in any event does not apply in this case) "did not engraft another exception on the statute which imposed a limitation upon the general equity powers of the federal courts with reference to enjoining proceedings in state courts."

Finally, Sterling argues that District Court should have enjoined the further prosecution of the Pack-Kahn Action in order to prevent the "harassment" and "vexation" of Sterling, citing **Scott v. Hunt Oil Company,** 398 F.2d 810 (5th Cir. 1968); **Higgins v. California Prune & Apricot Growers, Inc.,** 282 F. 550 (2nd Cir. 1922); and **Teas v. 20th Century Fox Film Corporation,** 413 F.2d 1263 (5th Cir. 1969).

The **Scott** case merely held that the district court did not abuse its discretion in causing a party to be in-

prisoned for contempt of court for failure of that party to comply with the court's order enjoining and prohibiting her from filing further legal proceedings arising from her alleged ownership of mineral interests in land. The court found that she had violated such injunction by filing a lawsuit in state court, and had caused her to be imprisoned. This Court affirmed the district court's judgment and in the course of the opinion stated that the district judge had the power to issue the injunction "to relieve Appellees of harassing and vexing litigation." The decision does not recite the facts of the prior litigation, but it appears that a final judgment involving an *in rem* action had been rendered against the party who was held in contempt. Therefore, it was proper for the district court to issue an injunction against the losing party in order to effectuate its judgment. Thus, the allegation of harassment and vexatious litigation does not constitute a separate exception to the prohibitions of § 2283.

In the **Higgins** case the plaintiff initially had brought suit against defendant in federal court in New York. While the defendant was in California engaged in discovery in the New York case, the plaintiff filed three separate, identical suits in California, and attempted to serve defendant there. Based upon those facts, the court had no difficulty in deciding that "the very evident and sole purpose [of the filing of such suits] must be to vex, annoy and harass the defendant." As this court has recognized and held, the very purpose for the filing of the Pack-Kahn Action was to afford Pack and Kahn (and the other parties who were attempting to intervene in the Jett-Chamberlain Action) their day in court, in the event they were not allowed to intervene in the federal litigation. (**Jett v. Zink**, pp. 729-730). Moreover, counsel for Sterling should have pointed out to this Court that the rule enunciated in **Higgins** was subsequently rescinded by the same court, at 3 F.2d 896 (2nd Cir. 1924), after the

Supreme Court decided **Kline v. Burke Construction Co.**, *supra*. In view of the **Kline** decision, the Second Circuit held that it had no authority to enjoin the California actions.

The decision in **Teas** is clearly distinguishable, since in that case there had been a final judgment in a federal court settling the obligations of the parties, and the unsuccessful litigant instituted state court proceedings through a subsidiary corporation in order to collaterally attack the judgment.

Finally, Sterling devotes six pages of its brief to quotations from the depositions of Jett, Pack and Kahn (taken on September 13, 1966, September 25, 1967 and September 25, 1967, respectively), apparently to support a *sub rosa* proposition that the "purpose of the Pack-Kahn Action was to deprive Sterling Oil of Sterling's federally-created right to have the Jett-Chamberlain-Sterling controversy decided in a federal forum." This is the same argument that Sterling made before this Court in **Jett v. Zink** (App. 591), Sterling's theory being at that time one of "fraudulent joinder." No reason is given why Sterling waited until this late date to present this "evidence" of "deprivation of federally-created right," and Sterling has failed to apprise this Court of the fact that Pack and Kahn have been represented by separate counsel since 1967 and were represented by separate counsel during the trial of the Pack-Kahn Action. Furthermore, it has long since been settled that there is no "federally created right" to have a diversity case tried in federal court. In **Kline v. Burke Construction Company**, *supra*, the Supreme Court held that "there can be no question of judicial supremacy, or of superiority of individual right" and expressly rejected the argument that the right to bring a diversity action in federal court is a federally created right which may not be defeated by a subsequent suit in a state court.

Presumably, the "vexation and harassment" of which Sterling complains was the action of State Court on March 8, 1971, setting the Pack-Kahn Action for trial on May 4, 1971, after District Court had informally announced that the trial of the Jett-Chamberlain Action would be held in July of 1971, although the order of District Court setting the Jett-Chamberlain Action for trial was not entered until May 3, 1971, one day before the trial of the Pack-Kahn Action commenced in state court (App. 303). Sterling's complaints are hollow indeed, since this Court has already held that the Pack-Kahn Act should be tried in State Court (a fact which Sterling has known since 1966), and they assume less significance in view of the fact that it was District Court, not Sterling, who moved to get the Jett-Chamberlain Action to trial, thereby triggering the trial of the Pack-Kahn Action.

The charge that Chamberlain has "fomented" litigation is baseless, since the only litigation of which Sterling is complaining is the prosecution of the Pack-Kahn Action, which this Court has expressly held was proper. Actually, the record shows that it is Sterling and its counsel who have "fomented" litigation and "vexed and harassed" Pack, Kahn, Chamberlain and others opposed to Sterling by its persistent efforts to prevent the trial of the Pack-Kahn Action in spite of this Court's ruling of June 23, 1966.

V

The Existence of the Federal Arbitration Act Does Not Create Independent Jurisdiction in District Court, and Therefore Does not Create an Exception to Title 28 U.S.C., Section 2283.

At this late date, Sterling now states that it "relies on federal substantive law created by the Federal Arbitration Act to compel arbitration under the Sterling Agree-

ment." Pretermitting the question of whether the Sterling Agreement provides for arbitration within the purview of the Act, Sterling has never demanded or made application for arbitration pursuant to the provisions of Title 9 U.S.C., § 3, and the cases cited by Sterling merely state that the right to compel arbitration once federal jurisdiction has otherwise attached is a matter of federal substantive law, not of state law. The Act does not create an independent basis for federal jurisdiction, for apart from the requirements of the Act itself, diversity of citizenship or a federal question is a prerequisite for federal jurisdiction. **Robert Lawrence Co. v. Devonshire Fabrics, Inc.**, 271 F.2d 402 (2nd Cir. 1959); **Ballantine Books, Inc. v. Capitol Distributing Co.**, 302 F.2d 17 (2nd Cir. 1962); and **Hamilton Life Ins. Co. of N.Y. v. Republic Nat. Life Ins. Co.**, 291 F. Supp. 225 (S.D.N.Y. 1968). The injection of the Federal Arbitration Act at that stage of the litigation was merely one more example of Sterling's desperate attempt to defeat State Court jurisdiction of the Pack-Kahn Action.

VI

District Court Did Not Abuse Its Discretion in Entering an Order of Continuance of the Trial of the Jett-Chamberlain Action Pending the Conclusion of the Trial of the Pack-Kahn Action.

Sterling has attempted to appeal from the order of continuance of July 14, 1971, by filing an "amended notice of appeal" on November 1, 1971 (App. 367). While we submit that the holding of this Court in **Jackson Brewing Co. v. Clarke**, 303 F.2d 844 (5th Cir. 1962) **cert. denied**, 371 U.S. 891 (1962) prohibits Sterling from appealing this decision since it was not a final order or judgment, the action of District Court in staying the Jett-Chamberlain Action was in any event clearly not an abuse of discre-

tion. A review of the motions for stay filed by the parties opposed to Sterling and the facts as set forth in the affidavit attached thereto (App. 304) set forth sufficient reasons for District Court's actions. The District Court's decision was eminently correct, in view of the fact that (1) the parties were then in the midst of the trial of the Pack-Kahn Action, (2) State Court, after approximately six weeks of trial conducted at great expense to the parties, had disposed of substantial issues pending between the parties, (3) State Court had determined to resume the trial of the Pack-Kahn Action and intended to dispose of the remaining issues within a short time thereafter, and (4) a final decree in the Pack-Kahn Action would dispose of all of the issues presented in the Jett-Chamberlain Action and the Sterling Action.

In **Landis v. North American Company**, 299 U.S. 248, 254-255 (1936), the United States Supreme Court held that:

> ". . . [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance [Citations omitted]."

Later decisions of the Supreme Court have confirmed the power of a federal court to postpone actions in a case before it when the issues of such case are pending in state court. See **Brillhard v. Excess Ins. Co.**, 316 U.S. 491 (1942); and **Provident Tradesmen Bank & Trust Co. v. Patterson**, 390 U.S. 102, 125 (1968), in which latter case the court reaffirmed ". . . our prior holding that a federal district court should, in the exercise of discretion, decline to exercise jurisdiction over a diversity action

raising issues of state law when those same issues are being presented contemporaneously to state courts."

This Court has held or recognized in numerous cases that the granting of an order staying action in the federal district court until the determination of a similar action pending in a state court is a matter within the discretion of the trial court and that it is proper to do so. **Ray v. Hasley**, 214 F.2d 366 (5th Cir. 1954); **Glen Oaks Utilities, Inc. v. City of Houston**, 280 F.2d 330 (5th Cir. 1960); and **Roecker v. United States**, 379 F.2d 400 (5th Cir. 1967).

It is to be noted that one of the factors that the court considers in determining whether to grant a stay is the priority of the filing of the respective lawsuits; however, it is clear from the cases that the rule of priority is not inflexible. "[A] Court should not simply ascertain which suit has been filed first, and mechanically stay the later action; the more significant consideration is 'whether the relief sought can be more expeditiously and effectively afforded' in one forum in comparison to the other." **Crawford v. Seaboard Coast Line R. Co.**, 286 F. Supp. 556 (S.D. Ga. 1968), at 558.

The "priority of initiation" factor was further questioned and in fact disregarded in **Aetna State Bank v. Altheimer**, 430 F.2d 750 (7th Cir. 1970), where one of the issues between the parties was raised first in federal court and subsequently in the state court, in two concurrently proceeding actions. The federal district court dismissed its action and the court of appeals ruled that the trial court should have stayed rather than dismissed. In the course of the opinion, the court of appeals stated as follows at page 758:

> "In any event, we do not here decide that the priority of the initiation is the sole controlling factor in the exercise of the doctrine of abstention. It is of course

to be given some significance and it is noted in the matter before us that litigation between the parties was initiated in the state court. It is our opinion, however, that the doctrine of abstention should have greater flexibility than would be indicated by blind routine adherence to the matter of priority of litigation. **Other factors, such as the totality of the issues before the respective courts, the convenience of parties litigant, the prospect of early completion of the litigation and any other aspects which might bear upon the fairness of litigation to all concerned, should be balanced by the court in determining whether to stay the proceedings.**" (Emphasis added.)

* * * * * * * *

"A stay pending the outcome of the litigation in another court between the same parties, involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery. ACF Industries, Inc. v. Guinn, 384 F.2d 15, 19 (5th Cir. 1957)." *Id.* at 755.

* * * * * * * *

"While it seems to be well established that a federal court is not required to abate the normal *in personam* action on a plea of a pending action in a state court, nevertheless, it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings. See Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17, 19 (2nd Cir. 1962). See also, Seaboard Finance Co. v. Davis, 276 F. Supp. 507, 511 (N.D. Ill. 1967)." *Id.*, at 756.

"We need cite no cases nor set forth any statistics on the obvious fact of the ever increasing work load on our courts, both state and federal. It is a salutary doctrine in our opinion which permits, when the same issues and same parties are involved in two courts,

even though these courts have concurrent jurisdiction, one court to have the discretion to direct by an appropriate stay order that the litigation be confined to one forum." *Id.*, at 756.

The doctrine of abstention as enunciated in **Ermentrout v. Commonwealth Oil Company**, 220 F.2d 527 (5th Cir. 1955) and **Meredith v. City of Winterhaven**, 320 U.S. 228 (1943), cited by Sterling, is inapplicable to the question of the stay order. District court did not **decline** jurisdiction of Jett-Chamberlain Action in deference to the jurisdiction of State Court over the Pack-Kahn Action; it merely **stayed** the trial of the federal action in order to prevent a collision with the trial of the Pack-Kahn Action in State Court, in which event the trial of both actions could have become unmanageable.

The District Court's action was particularly appropriate here, because it was the Pack-Kahn Action that first acquired all of the parties and all of the issues involved in this "convoluted litigation." Furthermore, it appeared to Judge Pittman that Sterling itself had contrived to unreasonably extend the trial of the Pack-Kahn Action in an apparent effort to bring the trial of that case in collision with the projected trial of the Jett-Chamberlain Action, as evidenced by his remarks to Sterling's counsel at the conclusion of the hearing on July 14, 1971:

> "Well, I must say this; for them to take six days on direct and you to take eighteen days on cross-examination, I am not sure there wasn't some element of trying to carry the case so that it couldn't be completed and tried over [t]here." (App. 359).

VII

The Decree in the Pack-Kahn Action Is *Res Judicata* as to the Jett-Chamberlain Action and Sterling Action, and It Was Therefore Proper for District Court to Dismiss the Federal Litigation.

The record shows without material contradiction that (1) the parties to the Jett-Chamberlain Action and Sterling Action are also parties to the Pack-Kahn Action, and (2) the issues raised in the Jett-Chamberlain Action and the Sterling Action are also present in the Pack-Kahn Action, or are within the scope of the issues raised in that case. In fact, this Court has long ago decided that the parties and the issues in the Jett-Chamberlain Action are also present in the Pack-Kahn Action, for it found in **Jett v. Zink**, at page 729, that:

> "The case before us on this appeal [the Pack-Kahn Action] involves the same parties, **and others,**[4] and the same subject matter [as the Jett-Chamberlain Action]." (Emphasis and footnote added).

Subsequent to this decision, the pleadings in both actions (including the Sterling Action) were amended to insert in all three cases the additional issue of economic duress and business compulsion raised by Jett and Chamberlain. While Sterling did not by pleading seek affirmative relief in the Pack-Kahn Action, as it has done in the Jett-Chamberlain Action, it nevertheless sought such affirmative relief by presentation of its case and evidence in that cause, and, by with drawing its previously-filed "disclaimer" against Pack, Kahn and Cornwall, thereby

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[4] It should be remembered that Pack, Kahn and Cornwall, parties to the Pack-Kahn Action, were not admitted to the Jett-Chamberlain Action until March, 1971, and then only as third-party defendants.

obtained a money judgment in its favor and against Jett, Chamberlain, Pack, Kahn, Cornwall and Kemp in the aggregate amount of $500,175.00.

As shown by the evidence filed in support of the motion for summary judgment, Sterling had a full and fair opportunity to present in State Court all of its defenses, affirmative or otherwise, and, through its counsel forcefully and exhaustively addressed itself to the merits of this litigation. The long and short of the matter is that the trial of the Jett-Chamberlain Action and Sterling Action in District Court would have resulted in the re-litigation of the same issues that were involved in the Pack-Kahn Action which had been finally concluded and determined by the final decree of State Court.

Indeed, Sterling does not deny that the issues and the parties are the same in these cases, nor that it was accorded a full and fair opportunity to present its case in State Court. Sterling argues merely that "in the circumstances of this case" the state court decree is not *res judicata*, but cites no authorities for this proposition.

Under Alabama law, a party is not entitled to re-litigate either issues raised in prior suits or issues which could have been raised in those suits, **Anderson v. Moore**, 372 F.2d 747 (5th Cir. 1967), and a judgment on the merits is an absolute bar to a subsequent prosecution of the action between the same parties on the same claim or demand, **A. B. C. Truck Lines v. Kenemer**, 247 Ala. 543, 25 So.2d 511 (1946).

> "The judgment of a court of competent jurisdiction is the final word between the parties to a controversy, and settles everything within the issues raised by the pleadings, and remains such until modified by the court or reversed by a higher tribunal, and is a bar to another action between the same parties for the

same subject matter . . .''[5] **Ex parte Carlisle,** 26 Ala. App. 142, 168 So. 598, 600 **cert. denied,** 232 Ala. 562, 168 So. 601 (1936).

Sterling concludes its brief with the statement that ''assuming this cause to be *in personam,* Sterling Oil is, we submit, entitled to its scheduled time at bat in the federal court . . .'' This is clearly not the law, for it is settled that where two *in personam* action are simultaneously pending in a state and federal court, a final judgment in one is a bar to any further proceedings in the other. **Penn General Casualty Co. v. Pennsylvania,** 294 U.S. 189 (1935), and **Kline v. Burke Construction Company,** 260 U.S. 226 (1922).

CONCLUSION

For the foregoing reasons, we submit (1) that Sterling is not entitled to relitigate the question of state court jurisdiction over the Pack-Kahn Action which has been previously settled by this Court in **Jett v. Zink,** nor to collaterally attack in this Court the State Court's determination of its jurisdiction over the cause; (2) that District Court's order of July 16, 1971, denying Sterling's petition to enjoin the continued trial of the Pack-Kahn Action was correct, and that the issue is moot in any event; (3) that District Court's order of July 14, 1971 staying the Jett-Chamberlain Action was correct, and in all events that question is also moot; and (4) that District Court's order of January 27, 1972 granting the motion for summary judgment to dismiss the Jett-Chamberlain Action and Sterling Action, was correct. Accordingly,

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[5] At this date, no party has sought to appeal from State Court's decree in the Pack-Kahn Action. A poll of counsel for all parties other than Sterling has determined that none of these parties will initiate an appeal, although they are not satisfied with all aspects of Judge Robertson's decree.

we submit that the foregoing orders of District Court are due to be affirmed.

Dated at Mobile, Alabama, this 19 day of May, 1972.

Respectfully submitted

HAROLD D. PARKMAN

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Mobile, Alabama 36602
Attorneys for Appellee, Bart B. Chamberlain, Jr.

Of Counsel
HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

Certificate of Service

I hereby certify that I have mailed a true and correct printed copy of the foregoing brief to Sam W. Pipes, Esq., Joseph M. Matranga, Esq., Champ Lyons, Jr., Esq., C. A. L. Johnstone, Jr., Esq. and Willis C. Darby, Jr., Esq., by depositing a copy of same in the United States mail, postage prepaid, addressed to each of said attorneys at their offices on this, the 9th day of August, 1972.

Harold D. Parkman

United States Court of Appeals
Fifth Circuit

71-2745

72-1637

G. H. Jett, et al.,

Plaintiffs-Appellees,

versus

Albert Barnes Zink, etc., et al.,

Defendants-Appellants.

APPENDICES TO BRIEF OF APPELLEE, BART B. CHAMBERLAIN, JR., FILED IN THIS CAUSE ON MAY 19, 1972

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Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON

APPENDIX A

In the Circuit Court of Mobile County, Alabama
In Equity

Case No. 60,357

Howard M. Pack, Joseph Kahn and Geo. H. Jett Drilling Co., Inc.,
Complainants.

vs.

Albert Barnes Zink, as Individual Trustee for Sterling Oil of Oklahoma, Inc., Herbert C. Smyth, as Individual Trustee for Sterling Oil of Oklahoma, Inc., and Sterling Oil of Oklahoma, Inc., a Delaware Corporation; G. H. Jett; Bart B. Chamberlain, Jr.; Cornwall Trading Corporation, Four States Drilling Company, James E. Kemp, the Equity Corporation, Walter C. Ivancevic, as Trustee for the Equity Corporation, Citronelle-Mobile Gathering System Company, Ltd., Gerald B. Waldron and Samuel Lane,

Respondents,

Bart B. Chamberlain, Jr.,

Cross-Complainant,

vs.

Howard M. Pack; Joseph Kahn; Geo. H. Jett Drilling Co., Inc.; Albert Barnes Zink, as Individual Trustee for Sterling Oil of Oklahoma, Inc.; Herbert C. Smyth, as Individual Trustee for Sterling Oil of Oklahoma, Inc.; Sterling Oil of Oklahoma, Inc., a Delaware Corporation; G. H. Jett; Cornwall Trading Corporation; Four States Drilling Company, Inc.; James E. Kemp; Kemp Oil Co., Inc., an Alabama Corporation; The Equity Corporation, a Delaware Corporation; Richard E. Peck, as Trustee for The Equity Corporation; Citronelle-Mobile Gathering System Company, Ltd., a limited partnership under the laws of Alabama; and Big Four Oil Co., Inc., a Texas Corporation,

Cross-Respondents.

Motion

Comes now the Respondent and Cross-Complainant, Bart B. Chamberlain, Jr., and respectfully moves the court as follows:

(a) To set for Friday, March 12, 1971, the argument on demurrers which were filed on July 2, 1968 to the Pleas in Abatement which were filed on May 3, 1968 by the Respondents and Cross-Respondents, James, Smyth and Sterling.

(b) To set this cause down for trial on the merits on May 3, 1971, unless its order shall be one over-ruling de-

murrers to the Plea in Abatement, and to order that on or before April 15, 1971, all parties file their answers, demurrers and other pleadings, each party to incorporate all his or its pleadings in a single document.

As grounds for this motion, movant respectfully shows that this action was commenced in this court on July 5, 1963; that on or about August 5, 1963, on the petition of Zink, Smyth, and Sterling, it was removed to the United States District Court for the Southern District of Alabama; that on or about January 6, 1964 the United States District Court denied the motion of the complainants to remand the cause to this court, but found that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion, whereupon the complainants appealed to the Fifth Circuit Court of Appeals, and on, to-wit, June 23, 1966, the United States Circuit Court of Appeals for the Fifth Circuit entered its order reversing the order of the U. S. District Court and ordered the cause remanded to the state court.

Thereafter the Respondents and Cross-respondents, Zink, Smyth and Sterling, applied for certiorari to the United States Supreme Court, where certiorari was denied on December 12, 1966.

Subsequently, and on January 24, 1967 this cause was remanded from the U.S.District Court to this court in compliance with the mandate of the U. S. Fifth Circuit Court of Appeals, but subsequently and after the movant had filed his cross-bill of complaint herein, the Respondents and Cross-respondents, Zink, Smyth, and Sterling, again removed this cause to the U. S. District Court and not until March 15, 1968 was this cause finally remanded to this court.

Thus by successive removals and other dilatory actions the Respondents and Cross-respondents, Zink, Smyth and

Sterling, have delayed a final disposition of this case for almost five (5) years. (August 5, 1963—March 15, 1968).

The Respondent and Cross-complainant offers to consent to the entering of an order by this court, at the same time when it rules on the demurrer to the Pleas in Abatement, authorizing the use in evidence on the trial of this cause, of all evidence, documentary and otherwise, produced or obtained by any party in cases No. 3010-63 and 3192-63 on the docket of the U. S. District Court for the Southern District of Alabama, to the same extent that the same would be admissible in evidence if obtained through discovery in this court, free of objection on the ground that the discovery through which such evidence was obtained was not had in this cause and in this court.

Movant respectfully shows unto the court that extensive discovery has been conducted in referenced causes in the U. S. District Court over a period of a number of years.

Respectfully submitted

DEWITT REAMS
JAMES D. BROOKS
Solicitors for Bart B. Chamberlain, Jr.
Respondent and Cross-Complainant

Of Counsel

PILLANS, REAMS, TAPPAN, WOOD
& ROBERTS
510 Van Antwerp Building
Mobile, Alabama

We, the undersigned, as counsel of record for the respective parties represented by us, hereby accept service

of the above and foregoing motion and waive all further service and notice of the hearing of same.

SAM W. PIPES, III
Counsel of Record
for Complainants Howard M. Pack and Joseph Kahn

JOSEPH M. MATRANGA
Counsel of Record
for Geo. H. Jett Drilling Co., Inc. and G. H. Jett

C. A. L. JOHNSTONE, JR.
Counsel of Record
for Four States Drilling Co., Inc., James E. Kemp and Kemp Oil Company

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Certificate of Service

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 5th day of March, 1971.

JAMES D. BROOKS

APPENDIX—B

Circuit Court—in Equity
at Mobile, Alabama

Entered on .....

Min. Book No. ..... Entry .....

Howard M. Pack, et al.,
vs.
Albert Vaughn Zink, et al.
} No. 60,357-R.

Order Setting Cause for Hearing on Merits

By order of the undersigned, the above styled cause is set for a hearing on its merits for Tuesday, May 4, 1971, at 9:30 A.M.

Dated, March 8, 1971.

s/ HUBERT P. ROBERTSON
Judge

APPENDIX—C

Circuit Court—in Equity
at Mobile, Alabama

Entered on .....

Min. Book No. ..... Entry .....

Howard M. Pack, et al.,
vs.
Albert Barnes Zink, et al.
} No. 60,357-R.

Order Denying Motion to Take Cause Out of Call

Upon motion of Willis C. Darby, Jr., solicitor of record for Sterling Oil of Oklahoma, Inc., a Delaware corporation, and Herbert C. Smith, as Individual Trustee for Sterling Oil of Oklahoma, Inc., in open Court to take out of the call for May 4, 1971, the above styled cause and upon consideration by the Court, it is Ordered and Decreed by the Court that said motion be and hereby is denied.

Dated, March 26, 1971.

s/ HUBERT P. ROBERTSON
Judge

APPENDIX—D

Circuit Court—in Equity
at Mobile, Alabama

Entered on .....

Min. Book No. ..... Entry .....

Howard M. Pack, et al.,
vs.
Albert Barnes Zink, et al.
} No. 60,357-R.

Order of Submission

This cause being set down for hearing on this day and now coming on to be heard is submitted for decree upon all written motions and demurrers pending and filed in the above styled cause.

Dated, March 26, 1971.

APPENDIX E

In the Circuit Court of
Mobile County, Alabama

Howard M. Pack et al.,
Complainants,

vs.

Albert Barnes Zink, et al.,
Respondents,

and

Bart B. Chamberlain, Jr.,
Cross-Complainant,

vs.

Howard M. Pack, et al.,
Cross-Respondents.

In Equity.
Case No. 60,357 R.

Order Holding Pleas in Abatement Insufficient and Granting Order to Strike Party

This cause coming on to be heard in open court on March 26, 1971, on Respondent and Cross-Complainant Bart B. Chamberlain, Jr.'s Motion to Strike W. H. James, Jr. as a purported party to the Pleas in Abatement, Motions to Strike the Pleas in Abatement, Demurrers to the Pleas in Abatement and Motions to Test the Legal Sufficiency of the Pleas in Abatement, and Motion by James, Sterling and Smyth to Strike Demurrers to Pleas in Abatement, and the court having heard oral argument of counsel, studied the briefs which were filed, after taking the matter under submission, now, upon consideration

by the Court, the Court is of the opinion that the Pleas in Abatement are due to be held insufficient and it is Ordered and Decreed by the Court that:

1. Each of the Pleas in Abatement in this cause are hereby Declared to be insufficient.

2. The Demurrers to each of the Pleas in Abatement are hereby sustained.

3. The Motion to Strike the Demurrers is hereby denied.

4. The Motion to Strike W. H. James, Jr. as Individual Trustee for Sterling Oil of Oklahoma, Inc., successor to Albert Barnes Zink, as Individual Trustee for Sterling Oil of Oklahoma, Inc., is hereby granted since the attempted making of him as a party was done without leave of court; and

It is further Ordered and Decreed by the Court that all parties are hereby given until April 16th within which to file any and all other pleadings which they desire to file prior to the commencement of the trial of this cause. All further defensive pleadings shall be incorporated into one pleading as provided under Equity Rule 16.

Dated: April 1, 1971.

/s/ HUBERT P. ROBERTSON
Judge

APPENDIX F

Circuit Court—In Equity
At Mobile, Alabama

Entered on .....

Min. Book No. ..... Entry .....

Howard M. Pack, et al.
vs.
Albert Barnes Zink, et al.
} No. 60,357-R.

Order—Pre Trial Conference

By order of the undersigned, it is Ordered that the above styled cause be set down for a pre trial conference on Wednesday, April 28, 1971, at 9:00 A. M.

Dated, April 23, 1971.

s/ HUBERT P. ROBERTSON
Judge

APPENDIX G

In the Circuit Court of Mobile County, Alabama

Howard M. Pack, et al.,
Complainants,
v.
Albert Barnes Zink, as Individual Trustee for Sterling Oil of Oklahoma, Inc., et al.,
Respondents,
and
Bart B. Chamberlain, Jr.,
Cross-Complainant,
v.
Howard M. Pack, et al.,
Cross-Respondents.

In Equity,
Case No. 60,357-R.

Pre-Trial Order

1. The question was raised by the Complainants and Cross-Complainant about the reporting of the case by additional court reporters so that daily transcripts of the record could be available during the course of the trial. The attorney for Sterling objected to anyone other than the official court reporter being responsible for the official record in the case. The Court after consideration Orders and Directs that the official court reporter, Bruce Howard, shall be responsible for the official record in the case but that additional reporters may be present in the Court and report the case at the expense of Cross-Complainant.

2. The Complainants, Cross-Complainant and Respondents other than Sterling offered to use in this Court all of

the discovery depositions and documents produced in Civil Actions 3010-63 and 3192-63, now pending in the United States District Court for the Southern District of Alabama. Sterling objected to the use of such depositions and documents and the offer was withdrawn.

3. For the purpose of examining witnesses and opening and closing statements the Court aligns the parties as follows: On the one hand, Complainants and Cross-Complainant and Respondents and Cross-Respondents, except Sterling, Zink, Smyth, and James and on the other hand, Sterling, Zink, Smyth, and James. The parties aligned together shall all complete their examination or cross-examination of the witnesses before the parties aligned on the other side begin their examination or cross-examination.

4. An offer was made by the Cross-Complainant to stipulate as to the authenticity of documents, letters, memoranda, books and records. Sterling objected, stating in Court that it would object to any "wholesale" stipulation but that it would not require proof of the authenticity of any of such documentation of which it had copies or knows to be authentic but it does not want to be put into the position of waiving any right which it would otherwise have as to a voir dire examination of witnesses through whom any such documentation is offered. After consideration it is Ordered and Directed by the Court that on May 4, 1971, at the commencement of the trial that the attorneys for all parties confer and see if they cannot then agree to stipulate as to the authenticity of at least part of the documents which are to be offered in evidence.

5. An inquiry was made as to what the procedure of the Court would be on objections to and rulings on the admissibility of evidence and the Court after consideration declares that its procedure will be to follow the provisions

of Title 7, Section 372(1), Code of Alabama, as Recompiled 1958.

6. The Court instructed that the parties who were interested in doing so should file with the Court as soon as practical such pre-trial briefs as the parties wished to submit prior to the commencement of the trial.

7. It was suggested that the preparation of some Exhibits, such as one showing definitions of oil phrases, terms and words which would occur during the course of the trial; one showing the owners of interests in the properties acquired from Gulf Oil Corporation and perhaps others showing similar information could be of assistance in the trial of the case and the Court instructed that any party who wished to do so should prepare such Exhibits; and present them for consideration of their properness at the beginning of the trial.

8. It was suggested by the Complainants and Cross-Complainant that an effort should be made to stipulate to as many facts as possible by all of the parties. Sterling objected to attempting to make any such stipulation at the pre-trial saying that they had not had an opportunity to prepare for such an endeavor. After consideration it is Ordered and Directed by the Court that the attorneys for all of the parties shall, on May 4, 1971, make a good faith effort to see how many facts can be stipulated to, by all the parties prior to the commencement of the trial.

9. It was suggested to the Court that the trial should be first of the issues contesting the validity of the "Sterling Agreement", which is attached to the Bill of Complaint; secondly, the issues relating to the construction of the agreement if the agreement has been found to be valid and, thirdly, the issues of accounting only if the agreement is found to be valid and only after the con-

struction has been determined. Sterling objected to this procedure, since following this method would preclude it from exploring all of the issues with each witness when that witness was first on the witness stand. The Court has taken this question under advisement and after consideration it is Ordered and Directed by the Court that the trial of the case shall proceed first to a determination to the issues of the validity of the "Sterling Agreement", secondly, to a consideration of the issues relating to the construction of the "Sterling Agreement", and, thirdly, to the issues relating to accounting only if and after the Court has concluded that the "Sterling Agreement" is valid and after the issues relating to construction have been determined by the Court. It is further Ordered that any party who produces a witness for any phase of the trial shall, if requested before the Court to do so, keep that witness available for examination by the other parties on any other issue that may thereafter be inquired into in the further proceedings in the trial.

Done this 3rd day of May, 1971.

/s/ HUBERT P. ROBERTSON
Judge

APPENDIX H

In the United States Court of Appeals
For the Fifth Circuit

G. H. Jett and Bart B. Chamberlain, Jr., Plaintiffs-Appellees,

versus

W. H. James, Jr., as Individual Trustee of Sterling Oil of Oklahoma, Inc., as Successor to Albert Barnes Zink, as Individual Trustee of Sterling Oil of Oklahoma, Inc., Herbert C. Smyth, as Individual Trustee of Sterling Oil of Oklahoma, Inc., and Sterling Oil of Oklahoma, Inc., Defendants-Appellants

No. 71-1763

Motion for Injunction Pending Appeal

Sterling Oil of Oklahoma, Inc., a Delaware Corporation, (Sterling Oil), W. H. James, as Individual Trustee of Sterling Oil (James), and Herbert C. Smyth, as Individual Trustee of Sterling Oil (Smyth), appellants above named, move the court for an injunction enjoining G. H. Jett (Jett), Bart B. Chamberlain (Chamberlain), Howard M. Pack (Pack), Joseph N. Kahn (Kahn), Geo. H. Jett Drilling Co., Inc. (Geo. H. Jett Drilling), their officers, agents, servants, attorneys and all persons in active concert or participation with them, from prosecuting that certain action entitled, **Howard M. Pack, et al. v. Albert Barnes Zink, etc. et al.**, In Equity No. 6357, Circuit Court, Mobile County, Alabama (Pack-Kahn Action), pending the determination of the appeal to the United States Court of

Appeals for the Fifth Circuit from the Order of the United States District Court for the Southern District of Alabama denying the motion of Sterling Oil, James and Smyth for a preliminary injunction against prosecution of the Pack-Kahn Action and as grounds therefor show:

1. On April 15, 1971, Sterling Oil, Smyth and James filed their Petition and Motion for Preliminary Injunction in the United States District Court for the Southern District of Alabama, to enjoin Chamberlain and others from prosecuting the Pack Kahn Action on the ground, among others, that the United States District Court for the Southern District of Alabama had exclusive *quasi in rem* jurisdiction over the oil, gas and mineral leases and other property which is the subject matter of the Pack-Kahn Action and for other reasons as more fully appear from the Motion for Preliminary Injunction and from the Petition for Preliminary and Permanent Injunction, a copy of each of which is attached hereto and made a part hereof.

2. On the 28th day of April, 1971, the United States District Court for the Southern District of Alabama denied the Motion for a Preliminary Injunction. A copy of the Order on Motion for Preliminary Injunction is attached hereto and made a part hereof.

3. On the 28th day of April, 1971, Sterling Oil, Smyth and James appealed the Order Denying the Motion for Preliminary Injunction to the United States Court of Appeals for the Fifth Circuit;

4. The Pack-Kahn Action is set for trial in the Circuit Court of Mobile County, Alabama, for May 4, 1971, at 9:30 A. M.;

5. Unless the injunction pending appeal is issued, Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling will proceed trial in the Circuit Court of Mobile County, Alabama, on May 4, 1971, prior to the time the United States

Court of Appeals for the Fifth Circuit will have an opportunity to rule on the appeal.

KILBORN, DARBY and KILBORN
By WILLIS C. DARBY JR.
Attorney for Sterling, James and Smyth
P. O. Box 2565
Mobile, Alabama 36606

Certificate of Service

I, Willis C. Darby, Jr., attorney for Sterling Oil of Oklahoma, Inc., hereby certify that I have this 28th day of April, 1971, mailed a copy of the foregoing Motion for Injunction Pending Appeal, postage pre-paid to the following:

Charles B. Arendall, Jr., Esquire
300 First National Bank Building
Mobile, Alabama

Joseph M. Matranga, Esquire
919 Dauphin Street
Mobile, Alabama 36604

C. A. L. Johnstone, Jr., Esquire
902 Merchants National Bank Building
Mobile Alabama

Sam W. Pipes, Esquire
2510 First National Bank Building
Mobile, Alabama

Champ Lyons, Esquire
57 Adams Avenue
Montgomery, Alabama 36101

Albert J. Tully, Esquire
1107 Milner Building
Mobile, Alabama

WILLIS C. DARBY, JR.

APPENDIX I

In the United States Court of Appeals
For the Fifth Circuit

G. H. Jett and Bart B. Chamberlain, Jr., Plaintiffs-Appellees, versus W. H. James, Jr., as Individual Trustee of Sterling Oil of Oklahoma, Inc., as Successor to Albert Barnes Zink, as Individual Trustee of Sterling Oil of Oklahoma, Inc., Herbert C. Smyth as Individual Trustee of Sterling Oil of Oklahoma, Inc., and Sterling Oil of Oklahoma, Inc. Defendants-Appellants.	No. 71-1763.

Appeal from the United States District Court for the Southern District of Alabama

---

By the Court:

The above entitled and numbered cause is before the court upon an emergency appeal by defendants-appellants seeking a stay of an order by the court below denying injunctive relief against state court proceedings.

The federal courts are restrained from granting injunctions against state court proceedings by the provisions of 28 U.S.C.A., § 2283. I am not convinced that the district

court abused its discretion in denying injunctive relief by its order of April 28, 1971, nor its denial of a motion seeking a stay of that order.

It is accordingly Ordered that the motion of the defendants-appellants for injunction pending appeal is hereby Denied.

/s/ JOE INGRAHAM
United States Circuit Judge

APPENDIX J

Telegram

148P CDT MAY 3 71 NSA239
NS MEY005 MEZ 1 MEZ 1 CM PDB 7 EXTRA MOBILE ALA 3 NFT

CHARLES B ARENDALL JR, ESQUIRE DLY 75
300 FIRST NATIONAL BANK BLDG MOBILE ALA

RE: G H JETT ET AL PLAINTIFFS-APPELLEES VS. W J JAMES JR., ETC, ET AL DEFENDANTS-APPELLANTS NO 71-1763

MOTION FOR RECONSIDERATION OF ORDER DENYING PRELIMINARY INJUNCTION PENDING APPEAL OF IN THE ALTERNATIVE FOR EXPEDITED HEARING ON THE MERITS

STERLING OIL OF OKLAHOMA, INC (STERLING OIL), W H JAMES JR, AS INDIVIDUAL TRUSTEE FOR STERLING OIL (JAMES) AND HERBERT C SMYTH, AS INDIVIDUAL TRUSTEE OF STERLING OIL (SMYTH) MOVE THE COURT TO RECONSIDER THE ORDER OF THE HONORABLE JOE INGRAHAM ENTERED MAY 1 1971 IN THE ABOVE ENTITLED MATTER DENYING THE MOTION OF STERLING OIL, JAMES AND SMYTH FOR A PRELIMINARY INJUNCTION STAYING STATE COURT PROCEEDINGS PENDING APPEAL ON THE GROUND THAT JUDGE INGRAHAM WAS "NOT CONVINCED THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING INJUNCTIVE RELIEF BY ITS ORDER OF APRIL 28 1971 NOR ITS DENIAL OF A MOTION SEEKING A STAY OF THAT ORDER", AND AS GROUNDS THEREFOR SHOW:

1. THE PRIMARY ISSUE BEFORE THIS COURT IS NOT WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING INJUNCTIVE RELIEF BUT WHETHER THE DISTRICT COURT COMMITTED AN ERROR OF LAW WHEN IT HELD THAT THE FEDERAL "ACTION IS IN PERSONAM AND THAT THE COURT IS WITHOUT JURISDICTION TO ISSUE THE INJUNCTION."

2. THE FOREGOING CONCLUSION OF LAW ESTABLISHES THAT THE DISTRICT COURT DID NOT EXERCISE ANY DISCRETION WITH RESPECT TO THE ADVISABILITY OF ENJOINING THE STATE COURT PROCEEDINGS.

3. THE CONCLUSION THAT THE ACTION IS "IN PERSONAM" IS CONTRARY TO LAW. THE JETT-CHAMBERLAIN ACTION, THIS ACTION, IS AN ACTION BY JETT AND CHAMBERLAIN TO DECLARE A CERTAIN AGREEMENT REQUIRING JETT AND CHAMBERLAIN TO TRANSFER INTEREST IN OIL AND GAS LEASES TO TRUSTEES OF STERLING, AN ACTION QUASI IN REM. SMITH VS. HUMBLE OIL AND REFINING COMPANY, INC., 425 F.2D 1287 1288 (5TH CIR., 1970). STERLING BY COUNTERCLAIM DEMANDED AN ACCOUNTING AND SPECIFIC PERFORMANCE OF THE AGREEMENT, ALSO AN ACTION QUASI IN REM. PRINCESS LIDA OF THURN AND TAXIS VS. THOMPSON, 305 U.S. 456, 83 L.ED. 285 (1939).

4. THE DISTRICT COURT EXERCISED ITS QUASI IN REM JURISDICTION WHEN IT ENTERED PARTIAL SUMMARY JUDGMENT DECLARING THE STERLING AGREEMENT VALID ON NOVEMBER 3, 1966.

5. THE DISTRICT COURT BASED ITS "IN PERSONAM" FINDING ON THE FACT THAT IN ADDI-

TION TO ASKING FOR SPECIFIC PERFORMANCE OF THE CONTRACTUAL OBLIGATION TO TRANSFER INTEREST IN SPECIFIC OIL AND GAS BUT TO STERLING OIL, STERLING OIL ALSO ASKED FOR MONEY DAMAGES IN THE EVENT THAT JETT AND CHAMBERLAIN WERE UNABLE TO MAKE ALL SUCH TRANSFERS BECAUSE OF PRIOR ASSIGNMENTS.

6. THIS COURT IN NATIONAL LABOR RELATIONS BOARD VS. ROYWOOD CORPORATION, 429 F.2D 964 (5TH CIR., 1970), HELD THAT WHERE, AS HERE, AS QUESTION OF EXCLUSIVE FEDERAL JURISDICTION EXISTS THIS COURT WILL DIRECT A DISTRICT COURT TO ENTER AN INJUNCTION BARRING STATE COURT PROCEEDINGS.

7. STERLING OIL SEEKS AN INJUNCTION AGAINST THE FURTHER PROSECUTION OF AN ACTION KNOWN AS THE PACK-KAHN-GEO. JETT DRILLING CO ACTION IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA, WHICH IS SET TO COMMENCE ON MAY 4, 1971, AND COULD LAST 30 DAYS THIS COURT, IN JETT VS. ZINK, 362 F.2D 723 (5TH CIR., 1966) CERT. DENIED 385 U.S. 987, 17 L.ED. 448, HELD THAT THE JETT-CHAMBERLAIN ACTION, AND THE PACK-KAHN ACTION, THE ACTION NOW PENDING IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA, WERE BROUGHT "FOR THE SAME RELIEF" (PAGE 725) AND THAT EACH HAD "THE SAME ISSUES" (PAGE 730).

DATED AT MOBILE, ALABAMA THIS 3RD DAY OF MAY, 1971.

RESPECTFULLY SUBMITTED

KILBORN DARBY AND KILBORN VINCENT F KILBORN PO BOX 2565 MOBILE ALABAMA 36601.

71-1763 1 1971 28 1971 1. 2. 3. 425 F.2D 1287 1288 5TH 1970 305 U.S. 456 83 L.ED. 285 (1939) 4. 3 1966 5. 6. 429 F.2D 964 5TH 1970 7 4 1971 30 362 F.2D 723 5TH 1966 385 987 17 L.ED. 448 725 730 3RD 1971.

APPENDIX K

In the United States Court of Appeals
For the Fifth Circuit

G. H. Jett and Bart B. Chamberlain, Jr., Plaintiffs-Appellees, versus W. H. James, Jr., as Individual Trustee of Sterling Oil of Oklahoma, Inc., as successor to Albert Barnes Zink, as Individual Trustee of Sterling Oil of Okla-Inc., Herbert C. Smyth, as Individual Trustee of Sterling Oil of Oklahoma, Inc., and Sterling Oil of Oklahoma, Inc., Defendants-Appellants.	No. 71-1763.

Appeal From the United States District Court for the Southern District of Alabama

By the Court:

The telegraphic motion of defendants-appellants for reconsideration of order denying injunction pending appeal is hereby Denied.

Consideration of defendants-appellants motion for injunction pending appeal by a panel of this court shall be duly entertained pursuant to Rule 8 F.R.A.P. and local Rule 10 (b).

/s/ JOE INGRAHAM
United States Circuit Judge

APPENDIX L

In the United States Court of Appeals
For the Fifth Circuit

G. H. Jett, et al.,
Plaintiffs-Appellees,

versus

W. H. James, Jr., etc., et al.,
Defendants-Appellants.

No. 71-1763.

Appeal From the United States District Court for the Southern District of Alabama

Before Brown, Chief Judge, Ingraham, and Roney, Circuit Judges

By the Court:

It Is Ordered that appellant's petition for injunction pending appeal, filed in the above styled and numbered cause, is hereby Denied.

APPENDIX M

In the United States Court of Appeals
for the Fifth Circuit

No. 71-1763

G. H. Jett and Bart B. Chamberlain, Jr.,
Plaintiffs-Appellees,

versus

W. H. James, Jr., as Individual Trustee of Sterling Oil of Oklahoma, Inc., as Successor to Albert Barnes Zink, etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Alabama

---

Before Wisdom, Coleman and Simpson, Circuit Judges

By the Court:

It is ordered that appellants' motion for an extension of time in which to file their brief to and including September 13, 1971, in the above styled and numbered cause, is hereby denied.

It is further ordered that the motion of appellee Bart B. Chamberlain, Jr., to dismiss the appeal, is hereby granted.

APPENDIX N

In the Circuit Court of Mobile County, Alabama
In Equity

Howard M. Pack, Joseph Kahn, and Geo. H. Jett Drilling Company, Inc.,
Complainants,
vs.
Albert Barnes Zink, et al.,
Respondents.
} Case No. 60,357.

Third Amendment to Defensive Pleading of Sterling Oil, James and Smyth

Sterling Oil of Oklahoma, Inc. (Sterling Oil), W. H. James, Jr., as Individual Trustee for Sterling Oil (James), as successor to Albert Barnes Zink, as Individual Trustee for Sterling Oil (Zink), and Herbert C. Smyth, as Individual Trustee for Sterling Oil (Smyth), file this their third amendment to the defensive pleading of Sterling Oil, James and Smyth filed on April 27, 1971, pursuant to this court's order of April 1, 1971, and to the amendment to answer of Bart B. Chamberlain, Jr. to amended bill of complaint.

Previous Defensive Pleadings Refiled

Sterling Oil, James and Smyth refile their defensive pleadings heretofore filed to the complaint and the complaint as last amended of Howard M. Pack (Pack), Joseph Kahn (Kahn), and Geo. H. Jett Drilling Company, Inc. (Geo. Jett Drilling) and to the answer as last

amended of cross-respondents, the Equity Corporation, Richard E. Peck, as successor trustee, and Cornwall Trading Corporation.

Answer to paragraph 21 of amendment to complaint of Pack, Kahn and Geo. Jett drilling

Sterling Oil, James and Smyth, without waiving their several, separate and distinct pleas in abatement, demurrers, please in bar and pleas of res judicata heretofore filed to the complaint of Pack, Kahn and Geo. Jett Drilling, in answer to paragraph twenty-one of the amendment to complaint of Pack, Kahn and Geo. Jett Drilling, say:

203. Sterling Oil, James and Smyth admit that prior to the 22nd day of April, 1965, Jett sold to Chamberlain and to Cornwall a certain interest in certain properties acquired by Jett and Chamberlain from Gulf Oil Corporation subject to the rights of Sterling Oil under the Sterling Agreement.

Sterling Oil, James and Smyth have no knowledge or information sufficient to form a belief as to the truth of the averment that Chamberlain and Cornwall did jointly assume and agree to pay 20% of the Sterling claim or that Chamberlain has the right to require Cornwall to pay its pro rate share (½) of the 20% of the Sterling claim.

Sterling Oil, James and Smyth deny that when Sterling Oil filed a disclaimer in the United States Court of Appeals for the Fifth Circuit, Sterling Oil intended to or did release Cornwall or Chamberlain from any claim of Sterling Oil, James or Smyth against Jett or Jett's successor in interest.

204. Further answering the complaint as last amended of Pack, Kahn and Geo. Jett Drilling, Sterling Oil, James and Smyth deny each and every allegation of the complaint of Pack, Kahn and Geo. Jett Drilling not herein admitted, controverted or specifically denied.

Answer to third amendment of answer of cross-respondents The Equity Corporation, Richard E. Peck as successor trustee, and Cornwall Trading Corporation

Sterling Oil, James and Smyth, without waiving their several, separate and distinct pleas in abatement, demurrers, pleas in bar and pleas of res judicata heretofore filed in this action, in answer to paragraph thirty-three of the third amendment of answer of cross-respondents, the Equity Corporation (Equity), Richard E. Peck, as Successor Trustee (Peck), and Cornwall Trading Corporation (Cornwall), say:

205. Sterling Oil, James and Smyth deny each and every allegation of paragraph thirty-three of the third amendment of answer of cross-respondents, Equity, Peck and Cornwall, except Sterling Oil, James and Smyth admit that by written agreement dated May 1, 1959, Sterling Oil and Zink entered into a subordinate agreement which was delivered to Equity in New York and that Peck now serves as successor to Walter C. Ivancevic.

Further answering paragraph thirty-three of such third amendment, Sterling Oil, James and Smyth say that their rights to receive payments and property from Jett and Chamberlain have never been subordinated to the Equity mortgage or note.

Further answering paragraph thirty-three of such third amendment, Sterling Oil, James and Smyth say that Equity, Chamberlain and Jett by extending the due date of the Equity note beyond a reasonable length of time; to wit, January 1, 1967, waived any right each and all of them may have had under the subordination agreements executed by Sterling Oil, its trustees and attorneys, or any of them.

Further answering paragraph thirty-three of such third amendment, Sterling Oil, James and Smyth say that Equity, Peck and Cornwall by receiving profits from the

Gathering System and producing properties waived any right Equity, Peck and Cornwall and any of them, may have had under any subordination agreement executed by Sterling Oil, its trustees and attorneys, or any of them.

Further answering paragraph thirty-three of such third amendment, Sterling Oil, James and Smyth say that the earnings of the Gathering System and the producing properties were sufficient to discharge the Equity note on or before January 1, 1963, and that Chamberlain, Jett, Pack, Kahn, Peck and Equity by and through Cornwall, the wholly owned subsidiary of Equity, appropriated the profits of the Gathering System and the producing properties to their own use and thereby nullified all subordination agreements in favor of Equity.

206. Further answering the answer of cross-respondents, Equity, Peck and Cornwall as last amended, Sterling Oil, James and Smyth deny each and every allegation of the answer of Equity, Peck and Cornwall as last amended including but not limited to allegations in the prayer of relief as last amended, not herein admitted, controverted or specifically denied.

Withdrawal of Disclaimer

207. Sterling Oil, James and Smyth hereby withdraw the disclaimer filed on or about April 22, 1965, in the United States Court of Appeals for the Fifth Circuit.

Dated at Mobile, Alabama, this 3rd day of November,

KILBORN and DARBY
By WILLIS C. DARBY, JR.
Post Office Box 2565
Mobile, Alabama 36601

Certificate of Service

I, Willis C. Darby, Jr., attorney for Sterling Oil, James and Smyth, hereby certify that I have this 3rd day of November, 1971, mailed a copy of the foregoing Third Amendment to Defensive Pleading of Sterling Oil, James and Smyth, postage prepaid to:

Joseph M. Matranga, Esquire
919 Dauphin Street
Mobile, Alabama

C. A.L. Johnstone, Jr., Esquire
Post Office Box 1988
Mobile, Alabama 36601

Champ Lyons, Jr., Esquire
57 Adams Avenue
Montgomery, Alabama

Dewitt Reams, Esquire
Post Office Box 2245
Mobile, Alabama 36601

Sam Pipes, Esquire
Post Office Box 2525
Mobile, Alabama 36601

Harold D. Parkman, Esquire
Post Office Box 123
Mobile, Alabama 36601

WILLIS C. DARBY, JR.

APPENDIX B

In the United States Court of Appeals
for the Fifth Circuit

No. 71-2745

G. H. Jett and Bart B. Chamberlain, Jr.
Plaintiffs-Appellees

versus

Albert Barnes Zink, as Individual Trustee for
Sterling Oil of Oklahoma, Inc.
Defendant

Sterling Oil of Oklahoma, Inc., Et. Al.
Defendant-Appellants

No. 72-1637

G. H. Jett and Bart B. Chamberlain, Jr.
Plaintiffs-Appellees

versus

Albert Barnes Zink, as Individual Trustee for
Sterling Oil of Oklahoma, Inc.
Defendant

W. H. James, Jr., Etc., Et Al.
Defendants-Appellants

Howard M. Pack, Et Al.
Third Party Defendants-Appellees

Sterling Oil of Oklahoma, Inc., Et. Al.
Plaintiffs-Appellants

versus

G. H. Jett and Bart B. Chamberlain, Jr.
Defendants-Appellees

Howard M. Pack, Et Al.
Third Party Defendants-Appellees

Appeal from the United States District Court for
the Southern District of Alabama

Supplemental Brief of Bart B. Chamberlain, Jr., Appellee

HAROLD D. PARKMAN
C. B. ARENDALL, JR.
3000 First National Bank Building
Mobile, Alabama 36602

Of Counsel
HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON

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Lubbock Hotel Co. v. Guaranty Bank & Trust Co., 77 F.2d 152 (5th Cir. 1935) 14

Monad v. Futura, Inc., 415 F.2d 1170 (10th Cir. 1969) 12

Princess Lida v. Thompson, 305 U.S. 456 (1938) 13

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Other Authorities

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ARGUMENT

This supplemental brief is being filed on behalf of Bart B. Chamberlain, Jr. (Chamberlain), one of the appellees in the above referenced appeals, in response to the reply brief of Sterling Oil of Oklahoma, Inc. (Sterling). We do not wish to burden the Court with further citation of authority and moreover, we are satisfied that the authorities which we have cited for our position on these appeals are sound and persuasive; therefore, we will not lengthen this supplemental brief with any examination of Sterling's attempts to distinguish our authorities. The purpose of this brief is to correct various assertions of fact made by Sterling in its reply brief and to point out some of the more material facts which Sterling has failed to mention.

I

The Effect of This Court's Decision in Jett v. Zink, 362 F.2d 723 (1966).

Sterling attempts to disregard this Court's decision in **Jett v. Zink** by arguing that the only issues before this Court at that time were (1) the question of the indispensa-
[2] bility as parties to the Jett-Chamberlain Action of Pack, Kahn and others, and (2) the question of whether or not Pack and Kahn had been "fraudulently joined" in the Pack-Kahn Action when they in their own right filed the suit in State Court. We have never denied that these were some of the questions raised during those appeals, but the issue was nonetheless the question of State Court jurisdiction over the Pack-Kahn Action. The precise questions were raised by reason of Sterling's theory or theories advanced in its efforts to sustain federal jurisdiction over the Pack-Kahn Action. In addition to those questions, Sterling also alleged in its petition for removal and argued in brief that State Court had no jurisdiction of the Pack-Kahn Action by reason of the existence of a "separable con-

troversy" and by reason of the fact that Pack-Kahn and all other parties whose citizenship would destroy federal diversity were "merely nominal parties." In sum and substance, the issue was whether State Court had jurisdiction of the Pack-Kahn Action based upon the pleadings in that case at that time, and Sterling used every conceivable theory and argument in its effort to prevent the trial of the Pack-Kahn Action in State Court, with one notable exception, that exception being the advancement of the theory of *in rem* or *quasi in rem* jurisdiction of the prior Jett-Chamberlain Action.

[3] The ultimate basis of the **Jett v. Zink** appeal was whether or not federal jurisdiction pre-empted further proceedings of the Pack-Kahn Action in State Court. The method then selected by Sterling to attempt such pre-emption was the filing of a petition for removal in District Court. The present method of attempted pre-emption was initiated by Sterling by the filing in District Court of a petition for injunction, based upon facts and pleadings which were available to Sterling in 1963. In essence, Sterling is relitigating the same question upon the same facts and pleadings which were considered by this Court in **Jett v. Zink**. The only difference is that Sterling has now advanced another theory in its effort to achieve the same result which it sought to achieve initially by removing the Pack-Kahn Action to District Court in 1963.

Sterling states that Chamberlain has asserted that **Jett v. Zink** determined the jurisdiction of the State Court over the entirety of the Pack-Kahn Action. That is not our position, since it is horn book law that the determination of each court's jurisdiction is in the final analysis a question for that court itself. In fact, by considering the pleas in abatement filed by Sterling in State Court, that court has determined the question of its own jurisdiction and it is through this appeal that Sterling is attempting **[4]** to have this Court hold for naught the State Court's determination

of its own jurisdiction, which determination Sterling is at this very moment seeking to reverse by its appeal to the Supreme Court of Alabama.

Sterling argues that the decision of this Court in **Jett v. Zink** did not establish that these actions are *in personam* and moreover that its findings are "consistent with a theory of *quasi in rem* jurisdiction" (Reply brief, Page 5). However, the concluding statement in this Court in **Jett v. Zink** that the two actions could proceed simultaneously in State Court and District Court is clearly **inconsistent** with the *quasi in rem* theory now advanced by Sterling, and we submit that this Court was in large measure led to make such a statement by reason of Sterling's *in personam* theory advanced at that time.

Had Sterling taken the position in 1963 that the Jett-Chamberlain Action was *quasi in rem* and therefore State Court had no jurisdiction of the Pack-Kahn Action, then we submit that the indispensability of Pack, Kahn and the others who **[5]** were seeking to be made parties in the Jett-Chamberlain Action would have been clear. Instead, Sterling "erroneously advanced" the *in personam* theory and thereby led this Court to believe that these absent parties need not be brought into the Jett-Chamberlain Action, since they could litigate about their rights vis-a-vis the Sterling Agreement in the Pack-Kahn Action. Now, however, and at this late date in the litigation, Sterling has taken an inconsistent position in an effort to prevent Pack, Kahn and the other parties from "taking advantage" of the final decree rendered by State Court in the Pack-Kahn Action.

On page 9 of its reply brief, Sterling states that this Court "did find that the Sterling Agreement purported to convey 'certain overriding royalties and other interests in the properties,' **Jett v. Zink**, 362 F.2d 727." **This statement is not true.** The Sterling Agreement itself does not convey

or purport to convey any interests in royalties or other properties and this Court did not so find. In fact, the Sterling Agreement itself states that nothing therein "shall operate as a conveyance to Sterling or to any trustee of Sterling, of an estate in land, nor shall the same operate as a conveyance or assignment of any interest whatsoever in any lease" (App. 74), a provision which Sterling's counsel [6] relied upon in brief to this Court in **Jett v. Zink**.

Sterling argues that the "basic issue here is whether Chamberlain may use the Pack-Kahn Action to defeat Sterling's right to have the issues between Sterling and Jett-Chamberlain . . . decided in a federal forum" (Reply Brief, page 10). If this indeed is the "basic issue," then this Court in **Jett v. Zink** clearly decided that issue against Sterling, for it held that Pack, Kahn and Geo H. Jett Drilling Co. were real parties in interest in the Pack-Kahn Action, and had stated good causes of action against Sterling under the Alabama Declaratory Judgment Act, **Jett v. Zink**, 352 F.2d at 730, which decision was upheld by State Court when it proceeded to try the Pack-Kahn Action. Since this Court's opinion in 1966, Sterling has attempted to circumvent **Jett v. Zink** by (1) unsuccessfully removing the Pack-Kahn Action a second time (on the grounds of an alleged "conspiracy" to defeat Sterling's alleged exclusive right to try this litigation in a federal forum); (2) by filing in the Pack-Kahn Action pleas of a prior action pending; (3) by filing a writ of prohibition in the Alabama Supreme Court on the eve of the trial of the Pack-Kahn Action; and (4) by prosecuting this appeal in an effort to undermine and/or void the final decree of State Court in the Pack-Kahn Action, [7] even though that decree is clearly *res judicata* as to the merits of the controversy. We submit that this "basic issue" has no basis in law or in fact.

II

The "Exclusiveness" of the Alleged Quasi In Rem Jurisdiction of District Court

Sterling asserts that District Court has exclusive jurisdiction over the properties which are involved in this litigation, claiming that the Jett-Chamberlain Action is *quasi in rem*. It is Chamberlain's position that the litigation is not *quasi in rem*, notwithstanding Sterling's legal contortions to make it so, but even if it should be such, the relief which was requested in the Pack-Kahn Action could not and indeed did not disturb any possession or control over the so-called *res* which Sterling states that District Court had or was supposed to have had.

The various theories which Sterling has used to characterize the nature of this litigation and its efforts to assert *in rem* jurisdiction reflects a pattern of seizing upon any theory of the moment which might conceivably nullify State Court jurisdiction over the Pack-Kahn Action. Having exhausted theories based upon removal jurisdiction by their first removal in 1963 and by their second removal in 1967, [8] Sterling asserted in its Petition for Preliminary and Permanent Injunction (App. 260-273) that the trial of the Pack-Kahn Action would deprive the Federal Court of its exclusive jurisdiction over the *res* of the Jett-Chamberlain Action, supposedly being the oil, gas and mineral leases described in the *lis pendens*. The petition also alleged that the trial of the Pack-Kahn Action would preclude District Court from enforcing Sterling's equitable interest as a lien on the aforesaid leases. At no time in this litigation has Sterling alleged any facts which would entitle it to an equitable lien, nor has it prayed for such. The petition did not attempt to characterize the litigation as *in personam*, *quasi in rem* or *in rem*, and it was only after Chamberlain, Pack and Kahn took the position that this Court has previously determined this litigation to be

in personam that Sterling refined its position by asserting that the Jett-Chamberlain Action is *quasi in rem*.

This petition was filed on April 15, 1971, approximately six weeks after the Pack-Kahn Action had been set for trial, but was not submitted to District Court for decision until July 14, 1971, after District Court had stayed the Jett-Chamberlain Action and after the conclusion of the trial of the first phase of the Pack-Kahn Action. District Court **[9]** denied this petition and it is from this order of denial that Appeal No. 71-2745 is being prosecuted.

In its effort to establish *quasi in rem* jurisdiction, Sterling has argued in brief that the bill of complaint filed by Jett and Chamberlain is one to quiet title. After we demonstrated in our brief that the allegations of this bill utterly failed to allege a quiet title action, Sterling abandoned that position and is now asserting in its reply brief that the designation of the bill is not preclusive, and that it is really an action to remove a cloud on title. On examination, this proposition must also fail since an action to remove a cloud on title in Alabama must seek to cancel an instrument **which on its face purports to convey title. Barksdale v. Jordan**, 253 Ala. 199, 43 So.2d 406 (1950); **Gibson v. Elba Exchange Bank**, 264 Ala. 502, 88 So.2d 163 (1956); and **Teal v. Mixon**, 233 Ala. 23, 169 So. 477 (1936). As pointed out above, and despite Sterling's assertions to the contrary, the Sterling Agreement by its express terms does not convey or even purport to convey any interest in property whatsoever.

Finally, Sterling argues that the allegations of the Jett-Chamberlain bill of complaint could sustain a bill in the nature of a common law bill *quia timet*. The mere assertion of such a proposition casts grave doubts upon the credi- **[10]** bility of Sterling's position on the appeal. The simple fact of the matter is that this litigation is an action for declaratory judgment seeking to determine the rights

of parties as to the validity, enforceability and construction of the Sterling Agreement.

In response to the Jett-Chamberlain complaint, Sterling has alleged a breach of the contract by Chamberlain and Jett, and has demanded an accounting for money which it claims is due to Sterling under the Sterling Agreement. Sterling has never demanded an accounting of "oil and gas property" as asserted in its reply brief at page 14. The prayer for relief in Sterling's counter-claim filed in the Jett-Chamberlain Action requests an accounting "and a judgment for the amount found to be due under said accounting." (App. 94). A review of Sterling's response to pre-trial order dated March 3, 1971, shows that it considers this action to be *in personam*, and not against any property (App. 173-210).

The fact that Sterling may have requested specific performance of Jett and Chamberlain respecting their alleged obligations under the Sterling Agreement does not require the Court to have control of the property in question, a fact that is borne out by the Alabama authorities cited by Sterling and Chamberlain. In **Holt v. Werbe**, 198 F.2d 910 (8th Cir. **[11]** 1952), it was held that the pendency of a request for specific performance in a prior action was not sufficient to invoke the prior court's jurisdiction over the property in controversy, and therefore did not preclude the prosecution of a subsequent action seeking to determine title to the subject property.

Sterling is obviously aware of the utter failure of the pleadings and its pre-trial statement to support its *quasi in rem* position, and in order to supply these deficiencies (thereby creating an entirely new cause of action), Sterling relies upon Rule 54(c) of the Federal Rules of Civil Procedure which provides in part that:

> ". . . **every final judgment** shall grant the relief to which the party in whose favor it is rendered **is en-**

titled, even if the party has not demanded such relief in his pleadings." (Emphasis supplied).

A common sense interpretation of Rule 54(c) shows immediately that this rule is designed to protect the parties in obtaining relief which they may ultimately prove themselves to be entitled based upon the allegations of their complaint, and not to serve as a vehicle to convert an action for breach of contract and demand for money damages into an action to impress a lien and/or a constructive trust, where such allegations essential thereto are not made. Sterling's position **[12]** would in effect require District Court to **assume** that Sterling would allege and in fact prove such a cause of action during the course of the trial, and therefore enjoin any subsequent action relating to the pleadings do not support such an assumption. **Garland v. Garland**, 165 F.2d 131 (10th Cir. 1947), and **Blazer v. Black**, 196 F.2d 139 (10th Cir. 1952), both relied upon by Sterling, as well as **Monod v. Futura, Inc.**, 415 F.2d 1170 (10th Cir. 1969), teach that the proper application of Rule 54(c) is to grant a claimant relief which he has **pleaded and proved**, irrespective of the relief which he may have actually prayed for. Whether or not Sterling could or would have pleaded and proved a right to an equitable lien upon the properties or impressed a constructive trust thereon is purely a matter of conjecture.

Very much the same interpretation as Sterling is attempting was placed upon Rule 54(c) by an appellant in **Convertible Top Replacement Co. v. Aro Manufacturing Co.**, 312 F.2d 52 (1st Cir. 1962), and the First Circuit, speaking through Woodbury, Chief Judge, disposed of this contention as follows, at page 58:

"But in addition to the allegations in its answer, Aro alleged in its counterclaim 'That this Court find and enter a decree herein that said Patent No. 2,569,724 has been misused.' And this its counsel **[13]** argues is a

sufficient allegation of a cause of action under the anti-trust laws because, he says, the record shows that Aro is entitled to damages for violation of those laws, and Rule 54(c) of the Federal Rules of Civil Procedure provides: '* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'

Even if we assume that the allegation of patent misuse in Aro's counter-claim has somehow survived to this stage of the litigation, the Rule quoted from above does not authorize a grant of the relief requested. That Rule should be liberally construed to grant a prevailing party substantial justice. **But it is not to be so liberally construed as to conflict with the requirement of Rule 8(a) that a pleading which sets forth a claim for relief, whether an original claim or a counter-claim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. There is no merit whatever in this appeal.''** (Emphasis supplied).

Finally, even if it be assumed, *arguendo,* that the Jett-Chamberlain Action is *quasi in rem,* the law is clear that such would not preclude the trial of the Pack-Kahn Action, since State Court could not and did not interfere with District Court's "possession" or "control" of the "*res*". This principle is firmly established in **Princess Lida v. Thompson,** 305 U. S. 456 (1938), and is fully discussed in **1A Moore's Federal Practice,** 2nd Ed., para. 0.222.

[14] This rule is so well established that it hardly needs citation of authority to support it. However, in addition to cases cited in our previous brief, the following cases are illustrative of the proposition that even in an *in rem* or *quasi in rem* action, a subsequent action involving the same

parties is not precluded if the subsequent action does not interfere with the "constructive possession" of the Court which first took jurisdiction: **Lubbock Hotel Co. v. Guaranty Bank and Trust Co.**, 77 F.2d 152 (5th Cir. 1935), (foreclosure of mortgage in subsequent suit even though receiver had been appointed in prior suit); **Barrett v. International Underwriters, Inc.**, 346 F.2d 345 (7th Cir. 1965), (subsequent suit determined rights of parties to liens on property in "constructive possession" of court in prior suit); and **Dempsey v. Pink**, 92 F.2d 572 (2nd Cir. 1937), (subsequent action determined rights of parties to liens and preferences against funds in actual possession of court in prior suit).

III

Sterling's "Right" to an Injunction Against the Prosecution of the Pack-Kahn Action

Sterling next argues that it was entitled to an injunction prohibiting the trial of the Pack-Kahn Action even if the litigation is *in personam* thereby ignoring the prohibitions of **[15]** Title 28 U. S. C. Sec. 2283. Its position on this issue is apparently based (1) upon an agreement between counsel for the parties that Sterling's pleas in abatement pending in the Pack-Kahn Action would not be set for argument without prior notice to all parties, and (2) upon the assertion that discovery had been had in the Jett-Chamberlain Action but not in the Pack-Kahn Action. Needless to say, such facts do not constitute an exception to the prohibition of Sec. 2283.

The purpose of the constant reliance by Sterling upon Mr. Parkman's letter to Mr. Darby relating to the general continuance of Sterling's pleas in abatement is unclear, although Sterling apparently desires to draw a subtle implication that this letter constitutes an agreement among counsel not to try the Pack-Kahn Action. Not only do the express terms of the letter negate any such implication, but

the reason such letter was written was to avoid the necessity of counsel for all parties being required to specially continue such pleas each time they were set for hearing by the clerk of the State Court, which at that time was approximately every two weeks. It is significant that at this same time there were pending in the Jett-Chamberlain Action numerous motions and other matters respecting issues and parties material to the trial of that case which had not been ruled on by [16] District Court, and in fact were not ruled on until after District Court announced its intention to try that case. In sum and substance, there was very little activity in either the Pack-Kahn Action or the Jett-Chamberlain Action during that period of time, due to the fact that the parties were engaged in related litigation in both state and federal courts, a fact that Sterling's counsel knows well.

Sterling states that issue had not been joined in the Pack-Kahn Action prior to the trial setting. We would also remind Sterling that issue had not been joined on all of the questions involved in the Jett-Chamberlain Action, nor had the more important question of the presence of all of the parties been determined at the time that case was announced for trial. Although the motion for the setting of the Pack-Kahn Action filed by Chamberlain, Pack, Kahn, Equity, Cornwall and Kemp was granted *ex parte,* Sterling nevertheless was in fact heard by State Court on its motion for a continuance of that case. Sterling was also heard by the Supreme Court of Alabama on its writ of prohibition to preclude the State Court judge from trying the matter, as well as by District Court on its **motion** for temporary injunction, and by this Court on its emergency appeal filed April 28, 1972, as we have previously detailed in Chamberlain's prior brief.

[17] Pack, Kahn, Chamberlain, Cornwall, Equity and Kemp all offered to use without objection in the Pack-Kahn Action all discovery obtained in the Jett-Chamberlain

Action, but Sterling refused the offer, as we have previously pointed out. As it turned out, most of the documentary evidence introduced by all parties during the trial of Pack-Kahn Action had been obtained through discovery in the Jett-Chamberlain Action. In any event, if Sterling was hampered in the trial of the Pack-Kahn Action by its inability to utilize Jett-Chamberlain Action discovery (and we do not understand Sterling to so complain) it was a self-imposed burden.

Finally, Sterling implied that the Pack-Kahn Action was "set for trial specifically to precede and conflict" with the Jett-Chamberlain Action (Reply Brief, Page 21). While the Pack-Kahn Action was obviously set on May 4, 1972, to precede the trial of the Jett-Chamberlain Action (even though at the time the former action was set, the latter action had not actually been set for trial), it was certainly not set in order to conflict with the projected trial of the Jett-Chamberlain Action (the month of July, 1972), since all parties had assumed it would require one month to try the litigation, even District Court (App. 248, 251). The fact that it did conflict can be attributed in large part to Sterling's **[18]** tactics in trying the first phase of the Pack-Kahn Action, a fact that was not lost on Judge Pittman, as we pointed out in page 57 of our prior brief.

IV

The "Abdication" of District Court's Duty to Try the Jett-Chamberlain Action

Sterling argues that District Court, having obtained removal jurisdiction of the Jett-Chamberlain Action, was bound to proceed to the trial of that case even if the litigation is *in personam*. Such is clearly not the law, as is shown by the cases and authorities which we have previously cited (and which Sterling has unsuccessfully sought to distinguish). It is significant that Sterling has been

unable to cite any cases which hold that District Court did not have discretion to stay the trial of the Jett-Chamberlain Action.

Sterling's counsel takes issue with our interpretation of the decision in **Aetna State Bank v. Altheimer**, 430 F.2d 750 (7th Cir. 1970), claiming that the Seventh Circuit did not disregard the "priority of initiation" factor. A careful reading of that case clearly shows that the party who was resisting the stay of the federal action did so on the ground **[19]** that one of the basic issues common to both state and federal cases was first raised in the federal court by counter-claim. Nevertheless, the federal court stayed its action.

Sterling states flatly that District Court "did not grant the stay on the basis of priority of initiation, or expense, or difficult questions of state law," but the stay was "apparently" based upon the estimated completion of the trial of the Pack-Kahn (Reply Brief, Page 27). This statement is rank speculation and completely ignores the facts as set forth in the record. The continuance of the Jett-Chamberlain Action was granted by District Court in response to the motion to stay filed by Chamberlain, Pack, Kahn, Cornwall, Equity and Kemp, to which motion was attached the sworn affidavit of Harold D. Parkman and Bart B. Chamberlain, Jr. (App. 308-322). A reading of the quotation of Judge Pittman's remarks does not by any stretch of the imagination support such an arguement as Sterling has advanced. On the contrary, the affidavit before Judge Pittman showed that: (1) the parties were then in the midst of the trial of the Pack-Kahn Action; (2) State Court, after approximately six weeks of trial conducted at great expense to the parties, had disposed of substantial issues pending between the parties; (3) State **[20]** Court had determined to resume the trial of the Pack-Kahn Action and intended to dispose of the remaining issues within a short time thereafter; and (4)

a final decree in the Pack-Kahn Action would dispose (and did dispose) of all of the issues presented in the Jett-Chamberlain Action. These were the salient facts and issues which were before District Court at the time the motion to stay was granted, which Sterling knows and knows well.

In any event, the question of the propriety of District Court's order staying the trial of the Jett-Chamberlain Action is moot in view of the final decree in the Pack-Kahn Action disposing of all of the issues in the federal litigation.

V

The Res Judicata Effect of Jett v. Zink on the Issue of "Fraudulent Joinder"

Sterling is at this late date apparently attempting to revive the issue of "fraudulent joinder" which it used previously as a basis for its unsuccessful removal of the Pack-Kahn Action. This Court in **Jett v. Zink** held that Sterling had failed to allege and prove fraudulent joinder as a basis for removal. Sterling now argues that it obtained the "evidence" of fraudulent joinder only after the decision in [21] **Jett v. Zink** by the taking of the depositions of Pack, Kahn, and Jett which was accomplished in 1966 and 1967. In reply brief Sterling also asserts that neither Jett, Pack nor Kahn had "ever" had any oral or written communication with counsel prior to the filing of the suit, which statement is supposedly based upon answers given by these parties during the taking of their depositions. If in fact these answers furnished evidence of fraudulent joinder, the only course open to Sterling would have been to promptly remove the Pack-Kahn Action on that ground a second time. When Sterling did in fact remove the Pack Kahn Action a second time in August of 1967, it alleged as grounds therefor that

there existed a "conspiracy" to deprive it of its "right" to have this litigation tried in a federal forum, utilizing at that time some of this "evidence" of fraudulent joinder. That removal was also unsuccessful.

In fact, Pack and Kahn obtained separate counsel in 1966, and undertook to prosecute the trial of the Pack Kahn Action in the State Court in 1971, and did so at considerable expense to themselves, suffering an adverse judgment in the approximate amount of $29,000.00 (App. 391-394).

[22] VI

The Effect of Sterling's Appeal of the Final Decree Rendered in the Pack-Kahn Action

In its appellants brief filed on April 17, 1972, Sterling concluded with the request that this Court direct District Court to issue an injunction against the prosecution of the Pack-Kahn Action and to enjoin Chamberlain, Pack, Kahn, Cornwall, Equity, Four States and Kemp from seeking to enforce any judgment in their favor in the Pack-Kahn Action. If this requested relief were granted, the effect would be to nullify the State Court's judgment rendered in the Pack-Kahn Action and thereby collaterally attack the jurisdiction of that Court. The authorities cited by Chamberlain in his brief of May 19, 1972, show that such collateral attack is not permissible, and that the proper course for Sterling to take in seeking to nullify the decree rendered in the Pack-Kahn Action is by appeal to the Alabama Supreme Court and then by petition for writ of certiorari or appeal to the United States Supreme Court (Chamberlain's Brief, Pages 39-40).

On May 29, 1972, the last day on which an appeal could have been taken from the Pack-Kahn Action, and subsequent to the filing of original briefs in this appeal, Sterling

in fact did file an appeal in that case. That appeal is not yet [23] ready for consideration by the Alabama Supreme Court because the record on appeal has not been filed in that Court, even though it was approximately eighty percent complete at the time Sterling filed its notice of appeal. Sterling has not diligently prosecuted that appeal and in fact has requested and obtained three extensions for the filing of the record on appeal, the latest extension date being January 15, 1973. In view of the fact that Sterling had six months within which to take an appeal and nevertheless waited until the last possible day to do so, and in view of its obvious disinterest in prosecuting such appeal with diligence, we can only conclude that Sterling is intent upon obtaining a prior decision from this Court in the hope that such decision would somehow preclude the Supreme Court of Alabama from affirming the decision in the Pack-Kahn Action holding the Sterling Agreement invalid. The apparent strategy of this course is to bring this Court into possible conflict with the courts of the State of Alabama.

In addition, Chamberlain (and perhaps Pack, Kahn and Cornwall) intends to cross-appeal from that portion of the State Court decree awarding a money judgment in favor of Sterling and against him, and the time for taking the cross-appeal by cross-assignment of error will not mature until the transcript is finally prepared. Therefore, any injunction issued by this Court or District Court, whether it [24] be temporary or permanent, could prejudice the rights of Chamberlain to effect a reversal of that portion of the State Court's decree.

CONCLUSION

For the foregoing reasons, we submit that the order of District Court dismissing the Jett-Chamberlain Action and Sterling Action is due to be affirmed.

Dated at Mobile, Alabama, this the .... day of November, 1972.

Respectfully submitted

.....

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Certificate of Service

I hereby certify that I have mailed a true and correct printed copy of the foregoing brief to Sam W. Pipes, Esq. [25] Joseph M. Matranga, Esq., Champ Lyons, Jr., Esq., C. A. L. Johnstone, Jr., Esq., and Willis C. Darby, Jr., Esq., by depositing a copy of same in the United States mail, postage prepaid, addressed to each of said attorneys at their offices on this, the .... day of November, 1972.

.....

Harold D. Parkman